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Civilians and Insurance: Approximations of Reality to the Law.
Guido Rossi, Edinburgh University*

*Mi mente
Se aplicó a las simétricas porfías
Del arte, que entreteje naderías
(Borges, El remordimiento)*

1. Premise; 2. The quest for the ‘right’ contractual scheme; 3. Lying on Procrustes’ bed; 4. Concluding remarks.

1. Premise

‘Italian writers, seeking in Roman law what is not to be found there, got themselves entangled in dissertations more likely to fatigue the mind than to enlighten it.’¹ With a couple of lines written in late eighteenth century, Emerigon dismissed centuries of Civilians’ debates (‘Italian’ should perhaps be read as *mos italicus*) as plain nonsense. He was right of course. And yet this article is entirely devoted to such nonsense. It does not aim at reconstructing the actual practice of insurance, but the issue faced by Civil lawyers. For a Civilian, a contract was valid if supported by Roman law. Some support, therefore, had to be found for this new contract. Inconveniently enough, early modern insurance had little to do with Roman law, yet it ought to be described through Roman categories. In other words, Civil lawyers had to square the circle. This paper does not aim at a thorough survey of early modern authors who dealt with insurance. There would be little point in that, as there are already excellent studies.² Rather, the purpose is to look at the most significant among those ‘mind-fatiguing’ dissertations in order to study the approach of Civil lawyers towards a new instrument. A first consequence is the choice of authors: medieval jurists will be overlooked almost entirely, little attention will be paid to moral theologians,³ and

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¹ *Les Docteurs Italiens, voulant trouver dans le Droit romain ce qui n’y est pas, se sont enveloppés dans des dissertations plus capables de fatiguer l’esprit, que de l’éclairer*, Balthazard-Marie Emerigon, *Traité des assurances et des contrats a la grosse*, Marseille, Chez Jean Mossy, Imprimeur du roi, 1783, vol. 1, p. 8.

² P.G. Pesce, “La dottrina degli antichi moralisti circa la liceità del contratto di assicurazione”, *Assicurazioni*, 33(1) (1966), 36-66; C. Bergfeld, “Die Stellungnahme der spanischen Spätscholastiker zum Versicherungsvertrag”, in P. Grossi, ed., *La Seconda scolastica nella formazione del diritto privato moderno* (Milan 1973), 457-471; S.M. Coronas Gonzales, “El Concepto de Seguro en la Doctrina Mercantilista de los Siglos XVI y XVII”, in *Boletín semestral de derecho privado especial, histórico y comparado del Archivo de la Biblioteca Ferran Valls i Taberner*, 1 (1988), 243-254; G. Ceccarelli, “Risky Business: Theological and Canonical Thought on Insurance from the Thirteenth to the Seventeenth Century”, *Journal of Medieval and Early Modern Studies* 31(3) (2001), 607-658.

³ This also means that the so-called *contractus trinus* (a combination of partnership, sale and insurance) will be ignored: hotly debated among moral theologians, it was neglected by Civilians (and, incidentally, never heard of in mercantile practice). For a short introduction on this ‘triple-contract’ see however the classic work of J. P. Levy, “Un palliatif a la prohibition de l’usure: le ‘contractus trinus’ ou ‘triplex’”, *Revue historique de droit français et étranger*, Série 4, 18 (1939), 423-433, esp. 425-426, and, among the most recent contributions, W. Decock, “In Defense of Commercial Capitalism: Lessius, Partnerships and the Contractus Trinus”, *SSRN Max Planck Institute for European Legal History Research Paper Series*, 2012(04), 1-36.

business-oriented authors⁴ will not even be taken into account. Further, chronology will not be strictly observed, authors repeating in a few lines what they found elsewhere will be normally overlooked, and secondary points will be dismissed. Complex debates not immediately related to the systematisation of insurance within the Civil law (such as causation and *casus fortuitus*) will not be mentioned.

If we accept them for what they are, Civilians' dissertations on insurance might prove fascinating. Far from providing a legal description of commercial reality, they offer some interesting insights in the way Civil lawyers filtered reality through the lens of Roman law. This 'approximation' of reality to the law took place on two distinct but complementary levels: first, the contractual category chosen to describe insurance; second, its application to actual insurance issues. No general contractual category (i.e. no nominate contract) was entirely compatible with insurance on both levels. This resulted in much mental gymnastics ('legal convulsions' would perhaps be more appropriate).

We will first examine the main contractual schemes adopted, and then proceed with the issues faced by their advocates. Once dealt with the Civilians' approach in their own terms, a short conclusion will seek to assess what reasons moved them.

2. The quest for the 'right' contractual scheme

2.1. Prologue: the problem of usury. From *locatio-conductio* to *emptio-venditio*

Although insurance was practiced almost continuously from antiquity,⁵ Romans had the great advantage not to be devout Christians. It was only in the Middle Ages that usury became a significant obstacle to insurance.

It is trite knowledge that the root of all problems on insurance was the premium: the insurer was simply agreeing to cover the value of the merchandise in case of mishap against the payment of a sum of money. The premium he received was therefore dangerously close to usury: barring mishap, his money would produce more money. In the Roman maritime loan (*foenus nauticum*), the insurer was also a lender. The sum lent to the borrower allowed him to furnish his ship or to acquire the goods with which he intended trading. The lender would receive back his loan, but only if the ship arrived safely at destination. Thus the insurer lent a sum to the merchant and assumed the risk of mishap. So, technically, he was not just producing money out of his capital. But, because of the risk involved, exorbitant interests were normally asked. This prompted pope Gregory IX to issue the famous decretal *Naviganti*, forbidding *foenus nauticum* as usurious.⁶ The decretal had a momentous effect: in a

⁴ That is, authors not interested in legal disquisitions. Legal issues might come up in works of writers such as Benedetto Cotrugli (or Benedictus de Cotrullis), Gerard Malynes and Jacques Savary (to name but a few), but always as a means to a different, more practically-oriented end.

⁵ This is particularly the case if one considers the Byzantine developments of the Rhodian Sea Law, especially the *chreokoinonia* (χρεοκοινωνία). For a short and recent overview see O. Maridaki-Karatza, "Legal Aspects of the Financing of Trade", in A.E. Laiou, ed., *The Economic History of Bizantium*, Harvard University Press, 2002, vol. 3, 1117-1120.

⁶ X.5.19.19: '*Naviganti vel eunti ad mundinas certam mutuans pecuniae quantitatem pro eo, quod suscipit in se periculum, recepturus aliquid ultra sortem, usurarius est censendus*.' On the interpretation and scope of *Naviganti*, the number of primary sources is exceedingly vast (and modern scholarly literature, boundless). Perhaps the best introduction is that of Martin de Azpilcueta, better known as Doctor Navarrus (1492-1586), *Commentario resolutorio de usura*, Barcelona, en casa de Clausio Bornat, 1557, both because it is entirely focused on the decretal (as interpreted by a great

short while overt contracts of *foenus nauticum* virtually disappeared from notarial records.⁷ If souls were safer, trade was in danger. *Naviganti* was clear in its prohibition, yet its target (the maritime loan) was a two-fold agreement: risk-shifting and money-lending.⁸ Channeling the prohibition to just one part of it would have meant saving the other. The more the taint of usury could be put on the loan, the easier it would be to rescue the risk-shifting element. In retrospect, it is hardly surprising that this is what happened: the two sides of the agreement were both logically and technically separable.⁹ One of the first important attempts to 'rescue' the risk-shifting element came from the famed theologian Bartolomeo of San Concordio (Bartholomaeus de S. Concordio, 1262-1347), the author of the widely popular *Summa casuum conscientiae seu Pisanella* of 1338.¹⁰ Bartolomeo argued that in *foenus nauticum* the lender's interest had a twofold cause: *ratione mutui* and *ratione periculi*. While the interest *ratione mutui* was usurious and condemned by Canon law, the interest *ratione periculi* was legitimate.

The idea began to gain momentum also among Canon lawyers. A few decades after the *Pisanella*, it was endorsed by one of the greatest Canonists of his time, Francesco Zabarella (1360-1417). With Zabarella the passage from maritime loan to modern insurance was already fully-fledged: while the loan ought to be condemned, 'the passage of the risk may well be the object of a separate contract'.¹¹

Focusing on the passage of risk (*susceptio periculi*) was the key. The problem was the legal clothing of such a passage. Not all Canon lawyers were as accommodating as Zabarella. In a guise or another, the same objection stood for centuries. As Sinibaldo de Fieschi (Sinibaldus de Fieschis, c.1195 – 1254, from 1243 Pope Innocent IV) lucidly argued, so long as the thing-at-risk remained with the insured any undertaking

number of late medieval and early modern scholars), and for it has the advantage to have been entirely translated in English by J. Emery, "Commentary on the Resolution of Money", *Journal of Markets & Morality* (2004) 7(1), 171-312.

⁷ See e.g. the Genoese registers examined by R. Doehaerd, *Les Relations Commerciales entre Gênes, la Belgique et l'Outremont d'après les Archives Notariales Génoises aux XIIIe et XIVe Siècles*, 3 vols., Bruxelles, Palais des Académies, 1941, and by L. Liagre-De Sturler, *Les Relations Commerciales Entre Gênes, la Belgique, et l'Outremont, d'après les Archives Notariales Génoises, 1320 – 1400*, 2 vols., Brussels and Rome, Institute Historique Belge de Rome, 1969. On the practical impact of the decretal see the important (but, strangely, seldom quoted) work of G. Mandich, *Le pacte de ricorso et le marché italien des changes au XVIIe siècle* (Paris: Librairie Armand Colin, 1953), 115-163, esp. 115-132.

⁸ See first of all J.P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, 2 vols., Cape Town, Juta, 1998, vol. 1, 4-7, and 22-25.

⁹ Civilians' approach to *foenus nauticum* falls way beyond the scope of this work. Glossators did not devote too much attention to the subject, yet their analysis is complex enough to discourage rushed attempts to provide a brief summary. Suffices to look at Accursius' glosses to D.22.2.1 (*Digestum vetus*, Perusiis, Cayn, 1476, § *Traiecticia*, fol. 417v) and C.4.33.2 (*Codex*, Venetiis, Baptista de Tortis, 1500, § *De nautico fenore*, fol. 117v; see also *ibid.*, C.4.33.4, § *Cum proponas*). Postglossators followed suit and continued to analyse the two faces of *foenus nauticum*, yet they did not feel the need to separate them in full – as merchants were beginning to. This started the progressive (and incremental) forking between law and practice on insurance.

¹⁰ The *Summa Pisanella* was probably meant as an 'updating' of the *Summa Confessorum* of Johannes von Freiburg (d. 1314) to integrate it with the *Liber Sextus* and the *Clementinae*. Perhaps because of the large number of manuscripts, there is no critical edition of the *Pisanella* to date. The relevant passage on insurance is transcribed in Pesce, note 2, 42, note 3.

¹¹ '*Susceptio periculi bene potest deduci in contractum de se*'. While the loan is illegitimate because usurious, 'it is lawful to receive something because of the transfer of the risk' ('*alias liceret propter susceptionem periculi aliquod percipere*'). Zabarella, *Francisci Zabarellae ... Super primo [-quinto] Decretalium subtilissima commentaria ...*, Venetijs, apud Iuntas, 1602, ad V.19.17, § *Naviganti*, fol. 89r.

would fall within the scope of *Naviganti*. To avoid this, there should be a clear relationship between the insurer and the thing-at-risk. For instance, continued Sinibaldo, if the shipmaster also acted as insurer of the cargo, the agreement would not be usurious. In such a case, the insurer would be effectively *doing* something (carrying the merchandise as well as being responsible for its safety) and so he could well receive a price for his work.¹² The future Innocent IV was a conservative on the subject, but his point was, technically speaking, inescapable. Unsurprisingly enough, the debate dragged on for centuries.¹³ So long as the insurer had no direct relationship with the thing-at-risk, his undertaking to preserve it against a premium remained suspicious.

This is probably why the first attempts to classify insurance as a nominate (and legitimate) contract looked at *locatio-conductio*. If *susceptio periculi* was considered as *labor*, then bearing the chance of loss would resemble an actual task. One of the first attempts – in truth no more than a hint – was made by the Florentine Dominican Piero Strozzi (Petrus Strozzi, 1293-1362).¹⁴ Strozzi's passage was then copied by the

12 *Commentaria Innocentii Quarti ... Super Libros Quinque Decretalium*, Francofurtum ad Moenum, per Martinum Lechler, impensis Hieronimy Feyerabend, 1570, ad V.19.17, § *Naviganti*, fol. 518v: '*fatemur tamen, quod si navigans pretium accipiat, vel aliud, ut pecuniam secum ultra mare deferret, ibi sibi redditur, sive periculum in se reciperet, sive non, non esset usura, sed locatio operarum, sed ubi non accipit pretium tantum, ut portet, sed negotiatori dat, ut in ea negotietur, haec est usura, quia pecuniae nullus est usus, vel utilitas utendi, nec deterioratur utendo [...]* Periculum et ex hoc dicimus, quod si aliquis paratus erat emere merces ad portandum alibi, vel ad servandum certo tempore, quod posset inde lucrari, et alius indigens pecunia ad eum veniat, et offerat eandem pecuniam cum lucro sperato in loco, quo ire volebat, et in termino se rediturum promittit, usura est contractus huiusmodi, nec scio eum excusare, licet alii contradixerint'.

¹³ The complex and long debate was in fact very simple. Ultimately, Canon lawyers were perfectly conscious of two irreconcilable facts: *foenus nauticum* was at the same time both useful (and wisely regulated by the Romans), and sinful (and expressly forbidden by the Church). This tension is already visible – indeed, almost palpable – in the work of the great Canon lawyer Henrico de Susa, cardinal Hostiensis (c.1200-1271), *Henrici a Segusio Cardinalis Hostiensis, Aurea Summa*, Coloniae, Sumptibus Lazari Zetzneri Bibliopolae, 1612, ad V.19.17, n. 3 and 5, c. 1434-35. First, Hostiensis briefly condemns the *foenus nauticum* without exception (*ibid.*, § *Quot sunt eius species* [n. 3], c. 1434-35). Then, he provides a lengthy and detailed explanation of its working – with the excuse of describing what the Romans did before the Canon law prohibition (*ibid.*, § *Ex quibus causis* [n. 5], c. 1435).

¹⁴ Strozzi, *Opusculum de Monte*, in J. Kirshner (ed.), "Storm over the 'Monte Comune': Genesis of the Moral Controversy over the Public debt of Florence", *Archivum fratrum praedicatorum* 53 (1983), 219-276, at 268, lines 350-351: '*Iste enim qui portat mercantias et assecurat, recipit pretium sui laboris vel periculi*'. The object of Strozzi's *Opusculum* was the liceity of Florentine public debt obligations (the *Monte Comune*), and in particular whether the bondholder of a forced loan obligation could sell the bond to a third party. It would seem that Strozzi wrote to dispute the argument of the Franciscan Francesco of Empoli (Francesco di San Simone da Pisa, 14th century). Francesco sought, in classical Franciscan fashion, to distinguish use of money from its possession, and so to allow the voluntary resale of the bond. The transferee would thus not step in the transferor's position, but they would remain different from each other. Further - and crucially - he argued that, as repayment of the capital is unsure, the interest that the transferee of the bond would receive is licit. Strozzi did not accept the distinction between use and possession, and so held that the transferee would replace the transferor and become the principal obligee of the forced loan. Accordingly, he could not receive any interest of the bond, for that would be usury. For a short summary see Ceccarelli, note 2, 618-619.

The principle that combining *labor* with *risicum* was the key to escape the decretal *Naviganti*. It derived directly from the text of the decretal itself, which put an exception to its prohibition: '*Ille quoque, qui dat X. solidos, ut alio tempore totidem sibi grani, vini vel olei mensurae reddantur, quae licet tunc plus valeant, utrum plus vel minus solutionis tempore fuerint valiturae, verisimiliter dubitatur, non debet ex hoc usurarius reputari. Ratione huius dubii etiam excusatur, qui pannos, granum, vinum, oleum vel alias merces vendit, ut amplius, quam tunc valeant, in certo termino recipiat pro eisdem; si tamen ea tempore contractus non fuerat venditurus*', V.19.17. For a short and

Canon lawyer Lorenzo Ridolfi (Laurentius de Rodulphis, 1362-1443) in his *Tractatus de usuris* (1402-1404), who classified insurance as *locatio-conductio*.¹⁵ In describing the insurer as the *locator* (*operae*),¹⁶ Ridolfi sought to distance the agreement from the usurious *mutuum* and to shape it as actual work. It was because of the *opus* he undertook that the insurer-conductor was paid by the insured-locator, not because of a purely financial undertaking. By Ridolfi's times Florentine insurance policies were rather open on the nature of the agreement: the insurer simply undertook to pay in case of mishap. The scheme envisaged by Ridolfi was therefore a close description of reality in Civil law terms: the insurer undertook the *opus* to warrant for the safety of the insured thing.¹⁷ It may not be fortuitous that Ridolfi seems to have been the first jurist to use the neologism '*assecurare*',¹⁸ for that was found in coeval Tuscan insurance practice. Closeness to reality, however, does not necessarily make things stronger in law. The objection of many Canon lawyers, embodied in Sinibaldo's few lines on the subject,¹⁹ stood like a Damocles' sword on the *locatio* scheme. No legal cosmetics could fully justify the premium. If the thing-at-risk remained with the insured, the *opus* was too abstract to cleanse the taint of usury.²⁰

particularly insightful example see e.g. Luis Saravia de la Calle (fl. 1544), *Instrucion de mercaderes muy proueçhosa. En la qual se enseña como deven los mercaderes tractar y de que manera se han de evitar las usuras de todos los tractos de ventas y compras*, Medina del Campo, Pedro de Castro ... a costa de Antonio de Vrueña, 1547, ch. 8, § *Del lucro cessante*, fol. 30r.

15 Ridolfi, *Tractatus de usuris*, in Zilettus ed., *Tractatus illustrium in utraque tum Pontificii, tum Caesaris iuris facultate iurisconsultorum*, vol. 7, Venetiis, 1584, *tertia particula principalis*, n. 8, fol. 38r: '*Praeterea hic videtur esse potius contractus locationis, quasi ille locet sub suo periculo et cum tali mercede conductionem harum mercium ad certas partes*'. Cf. E. Spagnesi, "Aspetti dell'Assicurazione Medievale", in E. Spagnesi, G.S. Pene Vidari, and B. Caizzi, *L'assicurazione in Italia fino all'Unità*, Milan, Giuffrè, 1975, 1-189, at 81-82, note 292.

¹⁶ Given the substantial affinity between *locatio operis* and *operarum*, it is not easy to qualify the insurer as *conductor* or *locator*. Apart from Ridolfi, all later advocates of insurance as *locatio-conductio* simply wrote about him as '*assecurator*'. It would be somewhat ahistorical (and dogmatic) to distinguish sharply between the two kinds of *locatio* until modern times. Given that medieval authors considered *locatio operis* essentially a kind of *locatio operarum* (or rather, they did not see the point in any sharp distinction between them), for the present purposes it seems more correct to qualify the insurer as *locator*, just as Ridolfi did. Cf. R. Fiori, *La Definizione della 'Locatio Conductio'. Giurisprudenza Romana e Tradizione Romanistica*, Naples, Jovene, 1999, esp. 306-308.

¹⁷ It has been suggested that Ridolfi sought to assimilate insurance to *locatio-conductio* because, in open conflict with the Franciscans, he sided against the separation of money's ownership from its use: Ceccarelli, note 2, 621. Further, in Ridolfi's treatise the *Monte Comune* issue comes immediately after insurance (both are in his *tertia particula principalis*; insurance is dealt with until n. 11, fol. 38v, and the *Monte* issue starts immediately thereafter, from n. 12, *ibid.*). However, while of course this is possible, there might be a simpler explanation. *Locatio-conductio* was the first contractual scheme invoked by Canon lawyers and theologians alike, starting at least in the thirteenth century. Already Sinibaldo de Fieschi used the *locatio* scheme to highlight the difference between lawful and usurious maritime contracts (*supra*, note 12). Further, and more importantly, *locatio-conductio* was an extremely broad contractual figure, capable of encompassing nearly any undertaking. The most objective description of insurance was the innominate *facio ut des*, but its the closest approximation as a nominate contract was *locatio-conductio*.

¹⁸ W. Ebel, "Die Anfänge der Rechtswissenschaftlichen Behandlung der Versicherung", *Zeitschrift für die gesamte Versicherungswissenschaft* 49 (1980), 7-20, at 13.

¹⁹ *Supra*, note 12.

²⁰ It is no coincidence that the sixteenth century author most fiercely opposed to insurance, Conrad Summenhart (1458-1502), effectively applied the same reasoning as Innocent IV to deny legal standing to insurance shaped as *locatio-conductio*: '[*assecurator*] *praedictus iustificando contractum [assecurati] inducit, quod ibi sit locatio et conductio, modo illa via cessat, quando nullas operas [assecurator] apponit circum mercem [assecurati]*.' It was difficult to consider a mere financial undertaking as *opus*: '*fundamenta cessant assecurans nullas impendit operas*'. Summenhart, *De*

The solution was suggested only a few years after Ridolfi by the Genoese Civilian Bartolomeo Bosco (Bartholomeus de Bosco, d.1433/37). Bosco fully accepted Sinibaldo's point – in order for the contract to be lawful, the thing-at-risk must pass to the insurer. And so it did: for Bosco, insurance was a particular case of *emptio-venditio*. The insurance contract was a conditional sale of the merchandise shipped: in case of safe arrival at destination, the sale was void.²¹ The whole mechanism was obviously thought as a way to use the principle *res perit domino*. The insurer would pay out because he was the *dominus rei*. This classification did not justify the premium but that was a minor issue, for it was not put in the contract and often paid in advance. The problem was how to force the insurer to honour his undertaking in the event of mishap without letting him bring up the usury question. At least, this was the main problem for learned jurists. From their perspective, the idea of a straightforward contract of sale solved many issues.

It is not clear whether Bosco was the first jurist to shape insurance as conditional sale. In the relevant passages of his *consilia* on the subject he never quotes any *auctoritas* other than Roman law texts. It is just possible that Bosco gave legal form to the thought of another theologian. Just as Ridolfi looked at Strozzi, so the possibility cannot be excluded that Bosco was influenced by the reflections on usurious contracts of Bernardino of Siena (St. Bernardinus Senensis, 1380-1444). Bernardino founded his argument on the same principle as Sinibaldo de Fieschi: only a clear, strong link between the insurer and the thing-at-risk would cleanse the contract from usury. *Locatio-conductio* would not do: the object of the insurer's *locatio* was not the thing, only the risk that it would perish. Hence, Bernardino thought of *emptio-venditio*. This would give the insurer ownership of the thing-at-risk: the strongest possible relation.²² In any case, it is not fortuitous that the sale model was envisaged – or brought to general attention – by a Genoese jurist. Unlike in Ridolfi's Florence, in Bosco's Genoa the policy was typically shaped as a fictitious sale of goods, sold by the insured to the insurer, of the same value as the thing-at-risk, whose payment was

Contractibus licitis, atque illicitis, Tractatus, Venetiis, apud Bernardum Iunctam, 1580, tract. 3, q. 71, p. 321.

21 Bosco, *Consilia egregij Domini Bartholomei de Bosco ...*, Lodani, apud Franciscum Castellum, 1620, cons. 369, n. 2, p. 570: '*assecuratio est contractus vltro citro obligatorius, quaestuaris, saepius reiterabilis, et est contractus emptionis, vt apparet ex verbis contractus, quibus statuitur C. de proba. l. ad probationem utilis dominii [C.4.19.21] et C. de solutione l. interesse puto [D.41.2.39] et de evic. l. cum tibi liberum [C.8.44.22] et ex substantialitate: nam si contingeret res, vel merces, super quibus facta est assecuratio, perdi, assecutor soluit pretium, et valorem, pro quo assecurauit, et recuperat merces, quae sunt suo periculo a se emptae, si recuperari possunt, propter quod modus faciendi istas securitates inuentus est per viam venditionis sub conditione resoluendae, sicut videmus in l. 2 ff. de in diem adiec. Cum ibi not. [D.18.2.1] Vnde Marcus assecurando emit, arriscauit, contractauit, siue contraxit, quae omnia potuit facere secundum tenorem dicti instrumenti. Et sic videtis, hanc rem esse indubitabilem.'*

22 Bernardinus Senensis, *Quadragesimale de Evangelio aeterno*, in Id., Sancti Bernardini Senensis ... *Opera Omnia*, Lvdgvni, vol. 2, 1650, *De Contractibus usurariorum*, Sermo 39, p. 249: '*dubium vel periculum a foenore non excusat, nisi apud lucrantem includatur dominium atque usus rei periclitantis, cum qua lucratur. Primo quidem dominium, quia ex re sua homo lucrati debet. Secundo usus, quia usus rei ex quo lucrum provenit, debet mediate, vel immediate ad lucrantem pertinere.*' While a clear link between Bernardino's *Quadragesimale* and Bosco's *consilia* is unlikely (the insurance-related *consilia* of Bosco deal with policies of the mid-1420s, whereas the *Quadragesimale* was written only during the last years of the 1430s), a looser influence of Bernardino's thought may not be excluded. He was appointed official preacher of the Observant Friars (reformed Franciscans) as early as 1405, and his sermons enjoyed great notoriety even before they were published in the *Quadragesimale*. Bernardino's first voyage to Genoa dates to the late 1410s: A.M. da Venezia, *Vita di San Bernardino da Siena*, Siena, Calcografia Editrice, 1854, lib. 1, cap. 12, 77.

conditional upon the safe arrival of the ship at its destination. If the ship arrived safely, the insured-seller would forfeit the payment for the goods he allegedly sold to the insurer-buyer; if the ship sank, he would be entitled to claim it. It is possible that Bosco looked at the mercantile practice of his city and then described it in Civil law terms, just as Ridolfi did in Florence. Bosco, however, sought to provide a stronger legal structure to his scheme. He could not possibly ground his reconstruction upon a blatantly fictitious sale of goods that – by a fortuitous coincidence – were of the very same value as the insured cargo. Hence, the fictional nature of the sale contract linked to the value of the insured thing was best ignored. It was safer to argue for a single contract of conditional sale, seemingly inspired by the similar market practice.²³

2.2. *Emptio-venditio*: from selling the thing-at-risk to selling the risk in the thing

Bosco was an influential lawyer, and his two *consilia* (at least, among those printed) devoted to insurance date to the mid-1420s. It is, however, only towards the end of the century that the same *emptio-venditio* scheme was re-elaborated in what became the first and most influential treatise on the subject. The *Tractatus de assecurationibus et sponsionibus mercatorum* of the Portuguese jurist, Pedro de Santarém (c.1460-?), better known as Santerna, was probably written in the late 1480s (the earliest extant manuscript is of 1488²⁴), but it was printed only in 1552.²⁵ ‘Obscure’ in the words of the Genoese Rota²⁶ and unsystematic in the eyes of the modern reader, Santerna’s treatise was however enormously influential.

According to Santerna, insurance is ‘the agreement whereby one bears the mishap of another against the price of the risk’.²⁷ Strictly speaking, the agreement is an innominate contract in the form of *facio ut des*: the insurer bears the risk so that the insured pays the premium (*‘suscipio periculum ut des pecuniam’*).²⁸ The insurer accepts to bear the risk of a mishap, not the mishap itself. The contract is conditional, for the payment depends on the event of mishap. ‘The contract of insurance is shaped this way: if it happens that your merchandise be lost during the sea-voyage [...] I

23 Cf. Coronas Gonzales, note 2, 251. The overwhelming majority of scholars seem to have read Genoese practice through the lens of Bosco and other later learned jurists to the point of ignoring the actual text of Genoese policies. So, it is very common today to find accounts of insurance shaped as a fictitious sale in the very same way as Bosco described them, thus missing entirely the subtle difference between practice and theorisations. The first authors who stressed the point, in the first half of the twentieth century, went more or less unheard: G. Valeri, “L’archivio Datini e gli studi storici di diritto commerciale attraverso il documento del 1329”, *Rivista del Diritto Commerciale* 26 (1928), 601-641, at 442; L. Piattoli, “La Scritta di Sicutà Genovese e una Speciale Scritta dei Mercanti Fiorentini in Genova Attraverso i Documenti dell’Archivio Datini”, *Assicurazioni, rivista di diritto, economia e finanza delle assicurazioni private* 6 (1939), 164-180, at 173.

24 MS Vat. Lat. 5922; D. Maffei, “Il giureconsulto portoghese Pedro de Santarém autore del primo trattato sulle assicurazioni (1488),” in *Estudos em Homenagem aos Profs. Manuel Paulo Merêa e Guilherme Braga de Cruz*, Boletim da faculdade de Direito de Coimbra, número especial (1983), 703-728, at 716.

25 Petri Santernae Lusitani iuris utrius doct. peritissimi ac famosissimi, *Tractatus de assecurationibus et sponsionibus mercatorum: nunc primum in lucem datus, cum repertorio et summarijs*, Venetiis, apud Baltassarem Constantinum, 1552.

26 M. Bellone, ed., *Decisiones Rotae Genuae De Mercatura et pertinentibus ad eam ...*, Venetiis [apud Franciscum Zilettum], 1582, dec. 166, n. 4, fol. 221v.

27 Santerna, note 25, pt. 1, n. 2, fol. 3v: ‘conventio, quia unus infortunium alterius in se suscepit pretio periculi convento’.

28 *Ibid.*, pt. 1, n. 7, fol. 4v.

promise to pay its value, so that you pay me [i.e. the premium].'²⁹ Santerna is therefore describing a financial undertaking which does not involve any transfer of ownership or possession: the cargo remains with its owner, the insured, and the insurer simply vouches for its safety. Yet, this guarantee clearly comes at a price – the insurance premium. For the insurer is just agreeing to cover the value of the merchandise in case of mishap against the payment of a sum of money. The sum he receives is therefore dangerously close to usury. Santerna was well aware that the *facio ut des* scheme was the most obvious, but not the safest. It could not shelter the insurance from usury accusations, for the *facio* of the insurer was just a conditional undertaking against the actual *des*, the unconditional payment of a sum of money. If the ship arrived safely at destination, the insurer would pocket the premium without doing anything. His conditional promise to use his money (to pay for the mishap) earned him some more money – a straightforward case of usury. This is why Santerna looked at the scheme of *emptio-venditio*. The insurance contract, argued the Portuguese author, 'may be assimilated to the sale and purchase contract because of the price paid for the risk'.³⁰

Whether other jurists wrote in support of the *emptio-venditio* scheme between Bosco and Santerna, we do not know. Nor do we know of any direct link between the two authors – at least, Santerna never quotes Bosco. Yet it may not be excluded that Santerna, who spent long years in Italy, was influenced by Bosco's reconstruction. The difference between the two authors – and, more generally, between Bosco and nearly all the later jurists who used the *emptio-venditio* model to describe insurance, lay in the object of the sale: no longer the thing-at-risk, but the risk that it would perish.³¹ Although perhaps not as watertight a solution than one might think at first,³²

29 *Ibid.*, pt. 3, n. 2-4 fol. 19v: '*iste contractus assecurationis est contractus conditionalis [...] Conceptitur enim contractus assecurationis hoc modo: si contingat in hac navigatione res tuas sive merces deperdi [...] ego promitto valorem tuarum mercium: et hoc, dummodo mihi des.*'

30 *Ibid.*, pt. 1, n. 7, fol. 4v: '*assimiletur emptioni venditioni propter pretium quod datur ratione periculi*'.

³¹ There were some exceptions, but they did not meet with particular success. One of the main ones came from the famed nominalist theologian Juan de Medina (1490-1546). As Bosco, Medina used the *emptio-venditio* scheme to circumvent the problem of the premium given for the *susceptio periculi*. Unlike Bosco, however, Medina was still thinking in terms of *foenus nauticum*, so that the undertaking he had in mind retained both its functions – financing and risk-shifting. Substantially, therefore, Medina's scheme was a variation on the theme of maritime loan – with the obvious advantage that it fell outside the scope of the usurious loan. The difference with the standard *foenus* lay in that the merchant-insured did not borrow money from the insurer-lender so to purchase the merchandise, but bought it directly from the insurer-buyer with a forward sale contingent to the safe arrival at destination. Under this contract, the merchant-buyer asked the insurer-seller to pay for the purchased cargo later, and only if it reached safely its destination. The agreement shifted the risk from the buyer to the seller, thereby inverting the principle *res perit domino*. And for this reason the seller was entitled to receive an extra – the insurance premium. *Ioannis Medinae ... De Poenitentia, Restitutione, Et Contractibus Praeclarum Et Absolutum Opus*, vol. 2, Ingolstadii, ex Officina Typographica Davidis Sartorii, 1581, q. 38, *causae* 1-4, p. 228-235, esp. *causa* 3, p. 233, lit. a, n. 3: '*in casu Decretalis [X.5.19.19] mutuans inducebat mutuatarium, ut sibi aliquid daret pro eo, quod mutuator periculum in se susciperet, nec [mutuans] volebat aliter mutuare, et ideo non gratis mutuare volebat, sed cum lucro, quod ex assecuratione sperabat. In nostro autem casu, venditor non volens suscipit periculum pretij expectati, sed ad instantiam emptoris: emptor enim petit a venditore, ut vendat illi mercem ad terminum, et pro pretio solvendo ei tempus aliquod concedat; quod si venditor annuat, precium mercis periculo exponit [...] Et ita emptor venditorem inducens, ut ad terminum vendat, ex consequenti eum inducit, ut valorem, seu pretium mercis periculo exponat: quod tamen venditor gratis facere non tenetur. In casu autem Decretalis mutuatarium non inducit mutuante, ut rem suam cum periculo mutuet, sed potius ipse mutuans praevenit, et mutuatarium compellit, ut si vult mutuatum obtinere, illum secundum contractum assecurationis secum ineat.*'

the fictional sale had obvious advantages. But it was probably too far-fetched to describe overt policies, where the undertaking was expressly described in terms of insurance. Only the Genoese stuck to their obscure policies, while most of other merchants insured openly. If the policy focused on the passage of the risk (and not of the property of the thing-at-risk), jurists had to find a legal mechanism to justify that. In shaping insurance as *emptio-venditio* Santerna describes the insurer as the buyer: 'he who underwrites against a premium is said to purchase the chance of mishap'.³³ Buying and selling the risk in a thing is a remarkably modern idea. We often say, especially in economic literature, that the insured 'buys' insurance. Yet, Santerna does exactly the opposite than one would expect. For him, it is the insurer who buys the risk. While the choice of *emptio-venditio* offered clear advantages to Santerna, it is not immediately obvious why the insurer had to be described as the buyer of the risk. Once again, the problem lay in the premium, the *pretium periculi*. What Santerna could not say was that the insurer accepted to bear the *periculum* for a price. To avoid that, he sought to focus as much as possible on the *periculum*, describing its *pretium* as merely ancillary. As the object of the sale is the *eventum periculi*, the *pretium periculi* is an accessory element to the transfer of the risk of such *eventum*.³⁴ Santerna played with the ambiguity of the term '*periculum*', which could refer either to the risk that the goods insured were lost or to the payment of their value in case of loss. The key-text is a well known passage in the Digest (D.22.2.5 pr.).³⁵

³² In the absence of further elaborations on Bosco's scheme, the boundaries of the liability of the insurer-buyer remained ill defined. The thing-at-risk was sold but never delivered to the insurer. So the principle *res perit a domino* was not fully applicable. While it would have sufficed for the proper *casus fortuitus*, it might have proven more problematic when the mishap derived from negligence – say, of the shipmaster, to whom the seller-insured had entrusted the thing. Cf. e.g. Sebastiano de' Medici (d.1595), *Tractatus De Fortuitis Casibus*, Coloniae Agrippinae, Ex Officina Ioannis Gymnici, 1596, pt. 1, q. 16, n. 20, p. 149. The issue is rather complex (and, moreover, speculative) and it depends on the definition of *casus fortuitus*, which falls beyond the scope of the present work.

³³ Santerna, note 25, pt. 3, n. 13, fol. 17r: '*qui assecurationem facit propter pretium, dicitur emere eventum periculi*'.

³⁴ The problem was illustrated clearly by Antonio Perez, (1583-1672), *Ant. Perez, Praelectiones in Codicem Justinianum*, Amstelodami, Sumptibus Anthoni Jacobi, 1645, ad C.4.33. n. 6, p. 192: '*Plane idem jus est terreni feneratoris, quod maritimi, veluti si creditor convenerit de suscipiendo periculum pecuniae transuehendae, per loca periculosa, et praedonum infidiis infestissima; cum utrobique militet eadem juris ratio, fundata in periculi susceptione [...] Haec tamen excusatio non placet Gregorio IX Pontifici, in cap. 19 De usur. [X.5.19.19] ubi dicit creditorem non posse etiam ratione periculi suscepti in se, supra sortem, sine nota usurarum quippiam accipere: sed commodum accipi potest de illo casu, quo praetextitur periculum, ubi nullum est, vel majus quam subset, sic ut lucrum maius sit ipso periculo.*'

³⁵ As the translation provided in the text diverges from most vernacular translations, it is important to provide the full text of D.22.2.5 pr. (from Scaevola's *Liber sextus responsorum*), from the Mommsen and Krueger's edition: '*Periculi pretium est et si condicione quamvis poenali non existente recepturus sis quod dederis et insuper aliquid praeter pecuniam, si modo in aleae speciem non cadat: veluti ea, ex quibus conditiones nasci solent, ut "si non manumittas", "si non illud facias", "si non convalueris" et cetera. Nec dubitabis, si piscatori erogaturo in apparatus plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si vicisset, redderet.*' Many interpolations have been suggested over the time, but most of them have no serious grounds, and they will not be considered here. Assuming the text is genuine, the translation provided above diverges on two main points from most translations. First, scholars read separately the conjunctions '*et si*' at the beginning of the text. The resulting translation would seem to exclude penal bonds ('... *et, si condicione quamvis poenali non existente, recepturus sis quod dederis*...') without any clear reason for that. This, incidentally, would strengthen the interpretation of '*aliquid praeter pecuniam*' as 'something else besides money' (as in the translation edited by A. Watson, *The Digest of Justinian*, Philadelphia, University of Pennsylvania Press, revised edition, 1998, vol. 1), which is rather misleading. Second, most translations consider the subordinate '*si modo in aleae speciem non cadat*' as excluding aleatory

One may recover what he has given, as well as something more, as compensation for bearing the chance of loss (*pretium periculi*), even if there is no penal clause, so long as the event is not a modal clause

The text refers to *foenus nauticum*, and so to an actual loan repayable upon condition that the ship arrives safely at destination. The insurer is also a lender, hence the reference to the recovering of what was given. Because of the *foenus nauticum* context, the term '*pretium periculi*' encompassed both the interest and the money lent (by the insurer-creditor to the insured-debtor) to buy the goods insured. The object of the contract, therefore, was not only a risk, but also a sum of money equivalent to the value of the goods.

In a proper insurance context, the insurer does not lend any money. Adjusting the text accordingly, the insurer receives a sum of money as 'compensation for bearing the chance of loss if the risk does not materialise'. This means that the insurer may retain the premium if the mishap does not occur.³⁶ In this context, the term '*pretium periculi*' is used both in its meaning of risk for which a price has been paid (and so the accent is on *periculum*) and in that of price given to accept the risk (and so the accent is on *pretium*). It follows that the same term can be used for both parties of the insurance contract: the insured pays a *pretium* to pass on the *periculum*, which the insurer accepts. Receiving the *pretium periculi*, the insurer is therefore accepting both price and risk. If we translate this into the *emptio-venditio* scheme, it is possible to

contracts. However, *foenus nauticum* itself is an aleatory contract. Moreover, Scaevola's passage ends with two examples that are unquestionably aleatory contracts: the loan to the fisherman to buy his equipment, and that to the athlete training for a competition. In both cases Scaevola states that there is no doubt that the lender can recover the loan (with interest) if the fisherman catches some fish or if the athlete wins the competition. The '*aleae speciem*' in the sentence must have given some trouble to glossators as well, for the Accursian Gloss reads '*aliam speciem*' and explains that such 'other species' refers to other contracts, different from *foenus nauticum*, such as the innominate '*do ut facias vel non facias*' (Accursius, note 8, *ad D.22.2.4 pr.*, § *Speciem*, fol. 322r). What might have troubled the Glossators was the reference to *alea*, precisely because *foenus nauticum* is aleatory. Rather, the sentence '*si modo in aleae speciem non cadat*' seems to refer to modal conditions, just as the examples immediately following the sentence – and clearly related to it through the adverb '*veluti*' – seem to do ('*veluti ea, ex quibus conditiones nasci solent, ut "si non manumittas", "si non illud facias", "si non convaluero" et cetera.*'). This interpretation is hardly new: see e.g. Guillaume Maran (1546 - 1621), *Guilielmi Marani ... Opera Omnia, seu Paratitla Digestorum ...*, Trajecti ad Rhenum, apud Joannem Broedelet, 1741, *ad D.22.2*, p. 204. But it is not popular among scholars. Among its most recent critics see P. Thomas, "Insurance in Roman law: Martialis *Epigrammaton* II 52", 2 *Journal of South African Law* (2009), 268-270, arguing that the Romans distinguished between aleatory contracts and pure wagers. As such, the '*aleae speciem*' should be referred to simple wagers, and not to aleatory contracts. The point clearly has some merit. But it is doubtful whether the Roman who played dice had to pay in advance, so the restrictive clause ('*si modo in aleae speciem non cadat*') would ill fit into the general statement '*recepturus sis quod dederis*'. Thomas seems to find confirmation of his argument in the writing of Gerhard Noodt (1647-1725), who made a distinction between aleatory contracts with a socio-economic function (such as insurance itself) and mere wagers, extremely common (and prohibited) at his time. Noodt, "Gerardi Noodt ... De Foenore et Usuris Libri Tres ...", lib. 2, ch. 7, in *Id.*, *Opera Omnia ... In Duos Tomos Distributa ...*, Ludguni Batavorum, apud Johannem Arnoldum Langerak, 1735, vol. 1, p. 218-219. The problem is that the distinction between 'useful' aleatory contracts and 'sterile' wagers is a late medieval and early modern one, developed in the attempt to justify insurance despite the usurious nature of *foenus nauticum*.

36 Cf. Scaccia, *Tractatus de Commerciis et Cambio*, Romae, Sumptibus Andreae Brugiotti, Ex Typographia Iacobi Mascardi, 1619, *Comm.*, § 1 q. 1, n. 2, n. 131, p. 36: '*mercibus manentibus salvis, id, quo pro suscepto periculo accepit, [assecurator] non tenebitur restituere, et hanc esse communem Doctorum approbatam sententiam*'.

consider the insurer as the buyer of the *periculum* against a certain *pretium*, and conversely the insured as the seller of the *pretium* to pass on the *periculum*. Because of the ambiguity of the *pretium periculi*, each party could be regarded as buyer or as seller. The same Santerna, having initially described the insurer as buyer (of the *periculum*),³⁷ then changes perspective and considers the insured as buyer (of the indemnity).³⁸ After Santerna, however, most authors preferred to focus only on the indemnity as the object of the contract (and not also on the *periculum*). This way, the insurer was considered only as seller and the insured only as buyer. An obvious explanation for this might lie in its simplicity – it is more intuitive to consider the insured ‘buying’ security rather than ‘selling’ the risk. But perhaps the reason lies in the progressive acceptance of insurance as a lawful contract. So long as some doubts were still lingering on the usurious nature of insurance, ‘selling’ security was somewhat dangerous. It was close to vouching for the safety of the thing in exchange for a sum of money – precisely the ‘weak’ *locatio* scheme of Ridolfi. By contrast, ‘buying’ the *periculum* was conceptually more distant from that, and therefore safer. This is probably why Santerna himself described the object of the sale first of all in terms of *periculum* (and so with the insurer as buyer), and only later also in the more realistic terms of indemnity (where the insurer is the seller). Santerna was writing in the late fifteenth century. In all probability, he still perceived the accusation of usury as a serious (or at least possible) threat to insurance. By the second half of the sixteenth century, few Civilians still regarded the decretal *Naviganti* as a menace. At least, by then the description of insurance in terms of *emptio-venditio* was widely considered more than sufficient to shield insurance from usury accusations. So, it was enough to apply the simple scheme of sale and purchase: if the insurer receives a payment, then he is surely the seller, and if the insured pays the premium, then he is surely the buyer. This was the approach chosen by Benvenuto Stracca (1509-1578), in his highly influential treatise on insurance (1569).³⁹ Some years later Lenaert Leys (Leonardus Lessius, 1554-1623) summed up Stracca's argument with a definition soon to become the standard one on the subject:⁴⁰

If one insures against a price he is selling his obligation, for he undertakes to pay the value of the thing in case it perished, and the counterparty – that is, the insured – is buying the same obligation.

Lessius’ definition was then followed verbatim by some of the most influential Civil lawyers who wrote on insurance, such as Sigismondo Scaccia (1568-1618) and

³⁷ *Supra*, note 33.

³⁸ Santerna, note 25, pt. 4, n. 45, fol. 43r: ‘*Item dominus mercium propter pretium periculi quod dat, videtur emere aestimationem suarum mercium*’.

³⁹ *Clarissimi Iurisc. Benvenuti Stracchae, De Assecurationibus, Tractatus*, Venetiis, 1569, *praefatio*, n. 8 and 35, fols. 12r, and 22r-v respectively (cf. also *ibid.*, gl. 6, n. 6, fols. 12r and 54r). On the probable influence of Santerna on Stracca, especially on the issue, cf. Santerna, note 25, pt. 1, n. 7, fol. 4v. Instead of writing a general treatise on insurance, Stracca glossed a policy of his city, Ancona. The policy has been recently translated in English: D. Kriel, “A 16th Century Insurance Policy”, 8 (2002) *Fundamina*, 133-136. A short but analytical comment on it may be read in F. Mansutti, “La polizza di sicurtà anconitana del 1567 nel ‘De assecurationibus’ di Benvenuto Stracca”, 76 (2009) *Assicurazioni, rivista di diritto, economia e finanza delle assicurazioni private*, 403-406.

⁴⁰ Leys, *De Iustitia et Iure Ceterisque Virtutibus Cardinalibus Libri Quattuor*, Lovanii, Masij, 1605, lib. 2, cap. 28, dub. 4, n. 24, p. 324: ‘*qui enim pretio assecurat, videtur vendere suam obligationem, qua se obligat ad solvendum rei aestimationem, in eventum quo perierit, et alter hanc videtur emere*’.

Francesco Rocco (1605-1676).⁴¹ Despite its success, as we will see, the formula contained the seeds of the most significant limitations to the *emptio-venditio* scheme.

2.3. From *locatio* to *fideiussio*

The *emptio-venditio* was probably the most successful scheme on insurance both in terms of adherents and of longevity, but it was not the only one. The *locatio-conductio* scheme, in all probability the first to be used for insurance, had its influential advocates throughout the early modern period.⁴² A number of authors referred generically to *susceptio periculi* as the object of the insurance, without specifying whether such a *susceptio* was a *sui generis* undertaking (and so an innominate contract) or it fell within the scheme of a nominate contract.⁴³ It is possible that some of them implicitly thought of a nominate contract, in which case the most obvious candidate should be (at least in principle) *locatio-conductio*. Nonetheless, the *locatio* scheme never had many followers. Initially, perhaps because it was not safe. Describing the *susceptio periculi* in terms of *operae* meant highlighting the actual task, and so the (usurious) warranty. Later on, because it paved the way to *fideiussio*. Once it became common to qualify insurance in terms of nominate contracts, some jurists began to look at the content of the insurer's obligation more closely, focusing on the warranty function of his undertaking. Since the insurer vouched for the thing to arrive at destination, they argued, his role was closer to that of a guarantor (*fideiussor*) than a *locator* (let alone a seller). Thus, the indemnity (or rather, the undertaking to indemnify) could be sold as *emptio-venditio* or more simply promised (in terms of guarantee) as *fideiussio*.⁴⁴

41 Scaccia, note 36, § 1, q. 1, n. 128, p. 35 (cf. also § 1, q. 7, pt. 3, lim. 6, n. 5, p. 440); Rocco, *De Assecurationibus*, in Id., *Responsorum legalium cum decisionibus centuria secunda ac mercatorum notabilia in sex titulos distributa*, Neapoli, ex Typographia Lucae Antonij Fusci, sumptibus Iacobi Antonii Bagnuli, 1655, not. 3, n. 7, p. 393. Cf. Van Niekerk, note 8, 190-191.

42 At the beginning of the sixteenth century *locatio-conductio* was the scheme chosen in the greatly influential work of Silvestro Mazzolini da Prierio (Sylvester Prierias, 1456/7-1523), *Su[m]ma Summarum que Syluestrina dicitur*, Argentiorati, Opera [et] Impensis ... Johannis G[r]ieninger, 1518, § *Negotium*, q. 5, fol. 344v. Towards the end of the century another important jurist did as much, Giovanni Battista Lupo (1533-1611), *De usuris et commerciis illicitis commentarii quatuor* ..., Venetia, apud Lucantonium Giuntam, 1577, *Commentarius tertius*, § 1, n. 18, fol. 96r. In the early seventeenth century, one of the most important jurists specialising in commercial matters opted for the same scheme (explaining it in greater detail). Juan de Hevia Bolaño (c.1570-1623), *Laberinto de Comercio terrestre y naval*, Madrid, por Luis Sanchez impressor del Rey n. s. a su costa, y de Geronimo de Courbes, 1619, lib. 3, ch. 14, n. 2, p. 652.

43 This was especially common among moral theologians. See e.g. Francisco de Vitoria (c.1483-1546), *De Iustitia*, (V. Beltrán de Heredia, ed., Madrid, Publicaciones de la Asociacion Francisco de Vitoria, 1934, tomo 4, *De iustitia*, qq. 67-88, quest. 78, art. 2 p. 634, and Juan de Lugo (Iohannis de Lugo, 1583-1660), *R. P. Ioannis de Lvgo ... Disputationvm de Ivstitia et Ivre*, vol. 2, Ludgvni, Sumpt. Laurentii Arnaud, et Petri Borde, 1670, disp. 31, sect. 6 (*rectius*, sect. 7), p. 447. Further literature in Pesce, note 2, 54-62.

44 It is not surprising, then, if one of the clearest definitions of insurance as *fideiussio* came from a jurist who considered insurance as *emptio-venditio*. Scaccia, note 36, § 3, gl. 3, n. 29, p. 622: '*qui enim assecurat, stat veluti fideiussor mercium, et pecuniarum adversus quemcumque casum sinistrum, et quia pro illo periculo accipit pretium, dicitur vedere illud periculum, et dominus pecuniae, alterius mercis assecratae, quia solvit pretium periculi, dicitur emere illud periculum [...] et ei, qui, fideiubendo, se periculo exponit, deberi periculi pretium*'.

Fideiussio had the clear advantage of being legitimate – the recompense of the guarantor was not usurious.⁴⁵ Indeed, many Scholastics of the Salamanca school approved of it – a clear sign of its moral legitimacy. Domingo de Soto (1494-1560) was one of the first to write of the insurer as *fideiussor*, albeit in passing.⁴⁶ The parallel proved popular, and it spread soon also among more legally-minded authors,⁴⁷ reaching even eminent law courts.⁴⁸ It was one thing, however, to allude to the insurer as *fideiussor*; it was another to describe insurance fully in terms of *fideiussio*. The majority of jurists used the parallel with *fideiussio* to underline the warranty function of the *susceptio periculi*, but then moved on to classify insurance – typically – as *emptio-venditio*.

In its fully-fledged version, the parallel with *fideiussio* had few enthusiasts, who were mainly Spanish scholars. The first thorough reflection on insurance as *fideiussio* was proposed by Bartolomé de Albornoz in his *Arte de los Contractos* (1573).⁴⁹ The main

45 Probably the clearest explanation of this point is in Luis Lopez (d.1596), *Instructionum negotiantium duobus contentum libris*, Salamanticae, excudebat Cornelius Bonardus, 1589, p. 356: '*Patet etiam, quia assecurator est veluti quidam fideiussor: sed fideiussor pro fideiussione secundum communem sententiam potest aliquid accipere: ergo et merus assecurator*'. See also, and especially, *ibid.*, p. 361: '*Tantum aduertito lector, quod quia fideiussio quodammodo quidam modus est assecurationis, ideo diximus absque vsura posse fideiussorem aliquid recipere a debitore, quia hic mutuum tacitum, vel expressum non est inuenire, cum fideiussor hic nihil praeter fidem cautionis praestet, et quia ratione obligationis qua astringitur periculum, et onus soluendi subire, si debitor principalis soluendo non fuerit, aliquam retributionem moderatam meretur*.' It may be useful to add that Lopez's work is nowadays typically cited in its 1593 edition with a different title (*Lodovici Lopez Tractatus de contractibus et negotiationibus*, Lugdunum, Ex Officina Iuntarum, 1593), but in many parts it hardly differs from his *Instructionum* of 1589. In particular, the section on insurance is reproduced verbatim (in the 1593 work it may be read in lib. 2, ch. 16, p. 121-132).

46 De Soto, *Fratris Dominici Soto ... De iustitia et iure Libri decem*, Salamanticae, Excudebat Ioannes Baptista a Terranoua, 1569, lib. 6, q. 7, p. 536, lib. 6, q. 7, p. 536: '*licitum est fideiubendi pro alio, quem non est adeo tutum solvendo fore, aliquid pro illo periculo suscipere cui se exponit solvendi. Persimile autem contingit in assecuratione*.'

47 Stracca, *De Assecurationibus*, note 39, *praefatio*, n. 45 *fol.* 25v-26r; Lupo, note 42, *Commentarius tertius*, § 1, n. 16, *fol.* 96r; Miguel Bartolomé Salón (1539-1621), *Controversiae de iustitia et iure, atque de contractibus et commerciis humanis, licitis ac illicitis ...*, Venetiis, apud Baretium Baretium Bibliopolam, 1608, vol. 2, § *Disputatio de Contractu Assecurationis*, art. 1, n. 3, p. 677; Scaccia, note 36, § 3, gl. 3, n. 29, pp. 621-622; Rocco, note 41, not. 91 n. 347, p. 418; Acacius Antonio de Ripoll (c.1475-1555), *De Magistratus Logiae Maris antiquitate ... Tractatus*, Barcinonae, Ex Praelo Antonij Lacavalleria, 1655, ch. 21, n. 124, p. 231; Ansaldo Ansaldo (Ansaldo de Ansaldis, 1651-1719), *De commercio et mercatura, discursus legales*, Romae, ex Typographia Dominici Antonij Herculis, 1689, disc. 70 n. 12, p. 428; Medina, note 31, q. 38, causa 3, p. 230 *lit. f.* and p. 231, n. 2.

48 Bellone, note 26, dec. 25 n. 6, *fol.* 89r; Juan Pedro Fontanella (1575-1649), *Sacri Regii Senatvs Cathaloniae Decisiones, per Ioannem Petrum Fontanella [...] elaborata*, vol. 1, Barcinone, ex Praelo, ac aere Petri Lacavalleria, in via Bibliopolarum, 1639, vol. 1, dec. 243, n. 23, p. 597 [Similarly, in the early seventeenth century the Senate of Barcelona considered the insurers '*fideiussores indemnitis*']; Alvaras Valasco (1526-1593), *D. Alvari Valasci ... Decisiones Consultationum ac Rerum iudicatarum in Regno Lusitaniae*, In Bibliopolio Commeliniano, 1607, lib. 1, consult. 18, proem., n. 1-2, 4 and 6, p. 87-91. This last *consultatio* is of particular interest, for it was entirely based on the assumption that insurance is truly a form of *fideiussio*. The conceptual closeness between *fideiussio* and insurance may be seen in other law courts as well see e.g. Cesare Manenti (fl. 1612), *Decisiones Sacri Senatus Mantuani*, Venetiis, apud Antonium Pinellum Impressorem Ducalem, 1622, dec. 54, n. 51, p. 214; Cesare Barzi (1542-1605), *Decisiones Almae Rotae Bononiensis*, Venetiis, apud Haeredem Damiani Zenarij, 1610, dec. 24, preamble and n. 1-6, pp. 45-46.

49 Albornoz, *Arte de los Contractos*, Valencia, En casa de Pedro de Huete, 1573, *fol.* 19v-20v. Cf. Coronas Gonzales, *El Concepto de Seguro*, p. 251. Despite his fame, our knowledge of Albornoz' life remains significantly wanting. What we know is that he was born in Galicia, studied at Salamanca, published his great opus in 1573, and spent a long time in the 'New World'. See E.S. Kloss, "El 'arte de

obstacle for a proper reconstruction of insurance in terms of *fideiussio* lay in the number of parties involved (debtor, creditor and debtor's guarantor): insurance was a party shorter. This algebraic inconvenience led some careful jurists to describe as *fideiussio* the guarantee of a third party to the insured about the insurer's solvency (the so-called insurance *de solvendo*), not the insurance itself.⁵⁰ But Albornoz was not a man to be easily discouraged. If the insurer fulfills the role of the guarantor, then the insured must be the party receiving the guarantee (and so, the creditor). What was missing was the debtor. Albornoz found the missing debtor in the thing-at-risk itself. The insured cargo or ship is the debtor, and its obligation lies in arriving safely at destination. If the insured thing 'defaulted', then the creditor (the insured) would have recourse on the guarantor (the insurer).⁵¹

It would be easy to dismiss such a reconstruction as extravagant. In fact, it was extremely ingenious. The great advantage of the *fideiussio* scheme lay in removing the insurer from the underlying relationship between main obligor and obligee. This way, the insurer-guarantor would look as a third party. The apparently bizarre idea of considering the insured thing as the obligor (undertaking to arrive safely at destination) was in fact a subtle way of 'internalising' the – potentially usurious –

los contratos' de Bartolomé de Albornoz, un jurista indiano del siglo XVI", Revista Chilena de Historia del Derecho 11 (1985), 163-185, at 166-169.

50 Scaccia, note 36, § 1 q. 1, n. 133, p. 36: '*fideiussor, assecurans mutuantem ad instantiam mutuatarij, possit assecurationis pretium exigere a mutuuario*'. Cf. Stracca, De Assecurationibus, note 39, *praeformatio*, n. 49 and 62, *fol.* 27r-v and 32v-33r respectively, and, somewhat more vaguely, Santerna, note 25, pt. 3, 55-58, *fol.* 25r-v. Although Civilians used *fideiussio* typically to describe insurance *de solvendo*, it may even happen to find mention of *fideiussio* in case of proper reinsurance: Flaminio Armenzani (1586-1676) Decisiones Almae Rotae Civilis Ser.Ma Reipublicae Genuensis, Aesii: Typographia Episcopali, 1679, dec. 31, n. 1, p. 108. In this case (probably dating to the early 1670s, as the policy was of 1668) the reinsurer was considered as *fideiussor assecuratoris*.

51 Albornoz, note 49, *fol.* 19v: insurance '*es una fianca pura, en la quale el acreedor es el señor de la mercaderia, y el obligado es la mercaderia que se obliga de llegar en salvamento y, para esto, die por su fiadorel assegurador, el qual la fia que llegarla, y, sino llegarla, que el pagara todo lo que la mercaderia vale*'. Cf. Juan Azor (Ioannis Azorius, 1535-1603), Institutionum moralium..., pt. 3, Romae, ex typographia Aegidis Spadae, 1611, lib. 11, cap. 18, p. 1020.

The level of abstraction of the *fideiussio* scheme's advocates was such that it overlooked a rather obvious objection: the *beneficium excussionis*. According this privilege, the creditor could demand payment to the *fideiussor* only after having sought satisfaction from the main debtor. As the main debtor is the thing insured, it does not exist as a legal party. So the *beneficium* can never take place. Interestingly enough, the only author to mention the point was Luis Lopez, but he was more concerned with the moral issue of whether it was lawful to sell one's *fides* (i.e. the guarantee) for money. Lopez, note 45, pt. 2, ch. 16, p. 361. As a matter of fact, the objection could have been easily solved, had Lopez looked at legal practice. Civil law distinguished between two kinds of *fideiussiones*: a *fideiussio simplex* and a *fideiussio indemnitis*. In the first case, the guarantee was *simplex* precisely because the *fideiussor* did not enjoy the *beneficium excussionis*. See e.g. Matteo D'Afflitto (c.1447 - c.1528) Decisiones Sacri Consilii Neapolitani, à Dn. Matthaeo de Afflictis ... emendatae (Lvdgvni: apud haeredes Iacobi Iuntae, 1552), dec. 318, n. 1-2, pp. 577-588; Gerolamo Magonio (1530-1596), Decisiones Causarum tam Rotae Florentinae, quam Rotae Lucensis, Venetijs, apud Sessas, 1605, dec. 38, n. 2-14, pp. 104-105, Ottavio Cacherano d'Osasco (d.1589), Decisiones Sacri Senatus Pedemontani, Taurini, Strata & Gallus, 1569, dec. 2, n. 14, *fol.* 9v; Flaminio Cartari (Flaminius Chartarius, 1531-1593), Decisiones Causarum Executivarum Rotae Reipublicae Genuensis, 2nd edn., Francofurti ad Moenum: Feyrabend., 1608, dec. 45, n. 1, p. 128.

mechanism of the transfer of risk. The insurer no longer owed the *rei aestimatio* to the insured (as in the case of *emptio-venditio*). Rather, the *rei aestimatio* was now owed by the *res* itself. The insurer would simply warrant its payment in case the main obligor were to default. Strictly speaking, the passage of risk would occur between the owner and his property: the thing-at-risk would warrant for its own safety, and its owner would merely seek additional security in case of its default. Ultimately, therefore, Albornoz sought to apply the insurance *de solvendo* mechanism to proper insurance contracts.

Albornoz's scheme was further elaborated by Francisco García (1525-1585).⁵² García worked on the underlying concept of *rei vindicatio*: the thing is obliged 'to arrive safely to the *power* of the creditor' because he is its owner.⁵³ The easiest explanation to first-year law students about *rei vindicatio* is the image of the magnet: ownership attracts the thing owned, regardless of who is in possession. To some extent García thought on the same line: the *res* 'tends' to its owner. He simply gave a legal form to this 'tension' in the insurance context.

García elaborated Albornoz's scheme (especially the 'internalisation' of the risk transfer) with reference to the *foenus nauticum*, so as to highlight the difference between the two contracts and the ensuing non-usurious nature of insurance. As we have seen, the position of many jurists was that the risk element (the *periculum*) would 'neutralise' the usury accusation.⁵⁴ This however was based more on subjective views about usury than on strict legal reasoning. All creditors faced some risk, for any debtor could default. Admittedly, in case of insurance the risk was magnified because of the objective danger to which the cargo was exposed. But it was not clear why a higher risk would *per se* ward off usury, especially since the interest rate was proportional to the level of risk. The adage *incertitudo tollit usuram* ultimately relied on moral grounds (or common sense), not on legal reasoning. It is probably not fortuitous that such an argument was more frequent among moral theologians than lawyers.⁵⁵ Legally speaking, the caveat of Sinibaldo still stood: Gregory IX's decretal prohibited interest *despite* the uncertainty of the gain. As a consequence the *foenus nauticum* had to be considered usurious 'even if the lender assumed the *periculum*'.⁵⁶

52 García, Tratado Utilísimo y Muy General de Todos los Contratos, Pamplona: Ediciones Universidad de Navarra, 2003; anastatic reprint of the 1583 edition, ch. 15, p. 473-480.

53 *Ibid.*, n. 449, p. 474: '*La mercadería asegurada es como el deudor, la cual se considera como si tuviese obligación de llegar salva a poder del acreedor, que es el dueño de ella, de la manera que el deudor tiene obligación de pagar al acreedor su deuda*' (emphasis added).

⁵⁴ See also *infra*, notes 82-83.

55 A good example is Diego de Covarrubias y Leyva (1512-1577), Variarum ex Iure Pontificio, Regio et Caesareo Resolutionum Libri III, Salamanticae, excudebat Andreas a Portonarijs, 1552, lib. 3, ch. 2, n. 5, fol. 174v: '*quod ultra sortem accipitur, non datur ratione mutui: nec propter usum pecuniae, nec propter nudum interesse interusurij (sic) temporis: sed propter aliam iustissimam causam: nempe periculi contra naturam mutui spectantis ad creditorem*'. Equitable as it might be, this reasoning could hardly lift the prohibition of the decretal *Naviganti*. Hence, Covarrubias highlighted the labour of the insurer-lender, the reasonable amount of interest, and any other possible feature which would make the interest look more as remuneration for actual work than a simple premium (*ibid.*, fols. 175r-176r). From a legal viewpoint, however, the problem was not solved. Cp. the second (and much revised) edition of the treatise of Luis de Alcalá (c.1490-1549), Tractado de los prestamos que pasan entre mercaderes y tractantes, Toledo, en casa de Juan de Ayala, 1546, pt. 2, fol. 29v (the first edition is of 1543).

56 François Marc (Franciscus Marcius, XVI century), Decisiones Aureae in Sacro Delphinatus Senatu Discussae ac Promulgatae, Venetiis, 1559, quaestio 891, n. 1, fol. 324v: '*naviganti vel eunti ad nundinas mutuans pecunias etiam si suscipiens in se periculum prohibetur aliquid recipere ultra sortem*'.

Albornoz's and García's insurance-*fideiussio* scheme sought to avert the application of *Naviganti* on strictly legal basis. Instead of arguing for the non-usurious nature of the undertaking (and so, avoiding the decretal *ex post*, through moral arguments), it preempted the decretal's applicability *ex ante*, focusing on the formal position of the insurer as simple guarantor.

Having described the thing-at-risk as the main debtor, García added that all this was obviously a fiction. Effectively, with regard to the insured, the position of the *res* and that of the insurer are one and the same. So, he concluded, the obligation of the thing to its owner is actually that of the insurer towards the insured: the thing simply represents the value of the obligation.⁵⁷ García insisted on the fictitious nature of the entire scheme not to give his game away, but to pave the way for his true innovation to Albornoz's scheme. Albornoz used the *fideiussio* scheme to avoid the decretal *Naviganti* with an abstract theorisation; García moved between legal fiction and reality so as to exploit their combined effect against the application of *Naviganti* to insurance.

While the *fideiussio* scheme personified the thing-at-risk, considering it the main debtor, in practice the position of the insurer and that of the thing-at-risk (the main debtor) were one and the same. The obligation of the thing-at-risk was therefore owed to the insured as owner of the thing. In the *foenus nauticum*, the insurer has a conditional credit against the insured: the latter would pay back the amount he borrowed if the thing arrived safely. As the *foenus* is a particular kind of *mutuum*, when the contract is made there is only one outstanding obligation – that of the borrower towards the lender. But describing the operation in terms of *fideiussio* meant keeping alive also the obligation of the lender to the borrower (or, in theory, of the thing-at-risk towards its owner). The insurer-guarantor would therefore still owe a debt to the insured (the *rei aestimatio*), which is precisely the same as his credit as lender. This would make the insurer at the same time debtor and creditor of the obligation, which would lead to the *ipso iure* setting-off of the two positions (or rather, to their mutual extinction by *confusio*).⁵⁸

At first sight, García's reasoning would appear clearly wanting. The entire scheme of *fideiussio* may be used so long as the insurer is not effectively lending money to the

57 García, note 52, ch. 15, n. 459, p. 477.

58 *Ibid.*, n. 459-461, p. 477-478: 'Arriba se declaró cómo, en este contrato, y en el de las fianzas, concurrían tres personas, el acreedor, el deudor, y el asegurador o el fiador. Dijimos más, que aunque formalmente entrevengan estas tres personas, con todo eso, no hay más de dos contrayentes, a causa de que el fiador o el asegurador, juntamente con el deudor, hacen oficio de un solo contrayente. De manera que el asegurador y el fiador siempre se tienen de parte del deudor, cuya obligación toman a su cuenta, y con quien hacen una misma persona. Luego si esto es así, no puede el que empresta salir fiador o asegurador de su mismo dinero, porque entonces el asegurador se tendría de parte del acreedor, y esto repugna a la naturaleza de este contrato. Quién jamás vio, que el mismo acreedor salga fianza, o pueda salir fianza por su misma deuda que otro le debe? Pues tampoco puede asegurar sus mismos dineros prestados que el otro le debe. Ultra de esto imposible es convenir en un mismo sujeto, y en respecto de una misma cosa, dar y recibir seguridad sobre un mismo negocio, porque el dar seguridad es acción, y el recibirla es pasión, y no se pueden hallar en un mismo sujeto, y en respecto de una misma cosa, acción y pasión, de suerte que el mismo que es agente de una cosa, ése sea el paciente de ella. Luego de que empresta no puede asegurar su misma moneda, haciendo oficio de acreedor y asegurador, porque (en cuanto es acreedor) recibe seguridad de su deuda, y en cuanto asegurador, promete y da la misma seguridad de aquélla. Más adelante, el que asegura o da seguridad, toma en sí los peligros temidos, el que recibe la seguridad, y a quien se hace el aseguramiento, queda libre de los dichos peligros; pero no es cosa posible que uno mismo reciba en sí y a su cuenta los peligros de una cosa, encargándose de ellos, y que juntamente quede libre de ellos. Luego no puede ser que uno mismo sea, en un mismo negocio, acreedor y asegurador, y por consiguiente, que el mismo que empresta, ése asegure sus dineros prestados.'

insured under a *foenus nauticum*. But that was precisely the point: shaped as *fideiussio*, insurance was incompatible with *foenus nauticum* – and so with any rule provided expressly for it.⁵⁹ Insurance was not the same as maritime loan, but the ultimate effect of the decretal *Naviganti* was to neutralise the defence of the lender's risk. As such, it could be applied by analogy to the risk of the insurer, in which case the *susceptio periculi* might not suffice to prove insurance as legitimate. García's ingenuity lay precisely in this: the usury accusation stemmed from the *foenus nauticum*, which the *fideiussio* scheme made inapplicable even by analogy to insurance. As García had it, 'the position of creditor is incompatible with that of insurer'.⁶⁰

2.4. Insurance as *sponsio*

Another possibility – the simplest – was to consider insurance as wager, shaped as a promise (*sponsio*, or *stipulatio conditionalis*).⁶¹ Jurists often mentioned *sponsio* when writing about insurance,⁶² but mainly for the sake of completeness – as yet another way to classify insurance. No lawyer dealing thoroughly with insurance considered wager a satisfactory option. This chiefly because *sponsio* is a supremely abstract agreement. Such abstraction led to a combination of great practical malleability and extreme legal inflexibility. Practical ductility, because it is possible to wager on anything. Whatever the content of the wager, legally speaking it would be not its object but its condition.⁶³ So, in the insurance context, the safe arrival of the cargo at destination would not be the object of the contract but rather the condition of the wager. This means that the actual object of the wager is somewhat peripheral to its structure, it is simply a condition attached to it. Wager has neither socio-economic function nor legal *causa* beyond itself. In the words of Scaccia, 'insurance has a clear *causa*, which is just and useful: the insured seeks to avoid the damage. *Sponsio* has an indirect *causa*, whose utility is not immediate'.⁶⁴ Legally speaking, the *causa* of the *sponsio* is the *sponsio* itself. Several authors argued that the *sponsio*'s condition

⁵⁹ Cf. Salón, note 47, § *Disputatio de Contractu Assecurationis*, art. 4, n. 6, p. 687.

⁶⁰ García, note 52, ch. 15, n. 462, p. 478: '*el oficio del asegurador repugna al oficio del acreedor*'.

⁶¹ In theory, it was possible to consider wager either a simple *sponsio* or a more formal *stipulatio conditionalis*. Yet in practice there was no difference, for in mercantile courts *sponsio* (as much as any other *nudum pactum*) was enforceable even if lacking of the formal vest of *stipulatio*: Stracca, *De sponsionibus*, in Id., *De Mercatura, seu mercatore, omnia quae ad hoc genus pertinent*, Ludguni, Apud Sebastianum Barptolomaei (*sic*) Honorati, 1556, pt. 2, n. 4, p. 179-183, esp. 182-183.

⁶² E.g. Santerna, note 25, pt. 3, n. 24, fol. 19v; Stracca, *De Sponsionibus*, note 61, pt. 11, n. 1, p. 194, and pt. 12, n. 1, p. 195; Lopez, note 45, pt. 2, ch. 16, p. 352-3; Scaccia, note 36, § 1, q. 1, n. 97, p. 25-27; Leys, note 40, lib. 2, cap. 22, dub. 11, n. 66, p. 281; Domingo de Bañes (1528-1604), *Decisiones de Iure et Iustitia*, vol. 4, Duaci, ex typographia Petri Borremans, 1615, q. 78, art. 4, p. 323-325; Hevia Bolaño, note 42, pt. 3, ch. 15, n. 12, p. 663; Ansaldi, note 47, disc. 70, n. 10, p. 428; Johan van der Sande (Johannis a Sande, 1568-1638), *Decisiones Frisicae. Sive Rerum in Suprema Frisiorum Curia Judicatarum Libri Quinque*, Amstelodami, Thomam Myls, 1698, lib. 3, tit. 9, def. 1, p. 145-146.

⁶³ Or, as elegantly put by Jean Wamèse (Johannes Wamesius, 1524-1590), '*purificatio conditionis*'. Wamèse, *Responsa seu Consilia ad Ius, Forumque Civile Pertinentia*, vol. 2, Antverpiae, apud Henricum Aretissens, 1651, centuria 4, cons. 24, n. 4, p. 65.

⁶⁴ Scaccia, note 36, § 1, q. 1, n. 131, p. 36: '*contractus assecurationis in substantia, et iustitia pretij non differt a contractu sponsionis, differunt autem solum in hac qualitate, quod assecuratio habet evidentem causam, iustam, et utilem, quia assecuratus intendit evitare damnum, at sponsio habet latentem causam, cuius utilitas non apparet, et hac ratione commercium assecurationis est Reipublicae utilius, et iustius*.' Clearly enough, the term '*causa*' is voluntarily ambiguous, for it refers both to the economic function of the agreement as well as the legal *causa negotii*.

should be treated as its *causa*.⁶⁵ Stracca in particular sought to colour the *causa* of the wager in terms of transfer of an actual risk, so to distinguish insurance-*sponsio* from other 'pure' forms of wager.⁶⁶

Such attempts, however, could not fully avoid the limits of *sponsio*, first of all its abstraction. For the focus of the agreement would necessarily shift from the safety of the thing-at-risk (and so on the impact the mishap would have on the ship or cargo insured) to the abstract occurrence of the condition. A good example comes from a hull policy shaped as a wager. The ship was spoiled by pirates and left as a wreckage, but a wreckage that arrived at destination. The object of the insurance-wager was whether the ship would arrive at destination. Technically she did, for 'even if torn to pieces it was then repaired keeping the same hull, leaving no doubt that it was the same ship'.⁶⁷ On this basis, the insurers refused to pay. Strictly speaking, the condition had not occurred: in its essence, the ship arrived at destination. The court was able to condemn the insurers only by moving away from the wager structure and stressing the *susceptio periculi* element.⁶⁸

In the above case the insurers were probably specious in their arguments, which might resemble the paradox of the ship of Argo, but they had a point in law. Yet the limits of *sponsio* may be more easily appreciated in case of blatant fraud. Absence of risk

65 *Ibid.*, § 1, q. 1, n. 89, p. 24: '*in stipulationis conditionalis solus eventus conditionis habetur pro causa*'. See also Santerna, note 25, pt. 2, n. 2-3, *fol.* 8v; Stracca, *De sponsonibus*, note 61, pt. 2, n. 4, p. 180: '*Conditio ipsa in sponsione adjecta pro causa habeatur, et de alia causa curandum non sit: succedit enim, cum existerit loco causae [...]* In illis verbis, est enim iusta conventio, si quaelibet causa in conditione iurisiurandi deducta fuerit [...] Et notandum est praedicta vera esse, etiam si conditio proprie dici non possit: ut in illa quae praesens, vel praeteritum tempus respicit: licet enim proprie non sit conditio, pro causa tamen habetur'.

66 Stracca, *De sponsonibus*, note 61, pt. 11, n. 1, p. 194: '*Si enim merces vel naufragio, impetu ventorum, vel tempestate, seu alio casu perierint, ex quo tuo periculo merces suscepisti, non interveniente stipulatione adversus te, qui promitisti, actione oneris adversi recte ago. [...]* Quam conventionem non improbandam ego etiam puto, propter periculum, quod promittentes (vulgo Assecuratores nuncupati) suscipiunt.' Cf. Denis Godefroy (Dionysius Gothofredus, 1549-1622), *Corpus Iuris Civilis in IIII Partes Distinctum* ..., Ludguni, in officina Barthol. Vincentij, 1583, *ad* D.22.2.5 pr., § *in aliam speciem* (lit. a), col. 693. The point was not fully appreciated by other jurists, who reduced insurance to 'pure' wager and thus lost the peculiarities of the instrument. For instance, in looking at insurance as a simple wager, Bañes seemed to forget that the premium did not correspond to the win of the insurer (in case of safe arrival of the ship), but it would be paid to him also in case of mishap. Bañes, note 62, q. 78, art. 4, p. 324, '*Contractum qui dicitur depositionis, sive daciationis (sic), quod vulgo dicitur, apuesta [wager], est enim perinde talis assecuratio, atque si assecurator deponeret 100 amittenda, si navis perierit, contra quatuor lucranda si non perierit.*'

67 '*Etiam si dillacerata [navis] esset cum tamen postea reffecta fuerit, eadem carina manente, non est dubium eandem navem esse*', Gabriel Pereira de Castro (1571-1632), *Decisiones Supremi Eminentissimique Senatus Portugalliae*, Vlyssipone, apud Petrum Craesbeeck, 1621, dec. 56, n. 9, p. 285. Cf. Stracca, *De Navibus*, in *Id.*, *De Mercatura, seu mercatore*, note 61, pt. 2, n. 9, 249. See also *Id.*, *De Sponsonibus*, note 61, pt. 13, n. 1-6, p. 195-196.

It might be noted that some jurists reasoned on a similar line, *mutatis mutandis*, so as to exclude the insurers' liability for cargo insurance when the mishap occurred on a lighter. When the place of arrival did not face on the sea but on a river, the cargo had to be brought to the ship or ashore through small lighters. And yet the lighter was not considered as an integral feature of the ship. So, in case of mishap occurring on the lighter, the insurer did not have to pay – unless he had expressly extended his obligation also to the lighters. Hevia Bolaño, note 42, lib. 3, ch. 14, n. 23, p. 657, Santerna, note 25, pt. 3, n. 36-39 *fol.* 21v-22r, and Stracca, *De Assecurationibus*, note 39, gl. 8, n. 7, *fol.* 61v-62r and esp. gl. 13, n. 3, *fol.* 97v-98r.

68 Pereira, note 67, dec. 56, n. 10, p. 286: '*assecuratores, qui periculum subeunt in corpore navis, quod illa vivente non tenetur, unde si a pyratibus (sic) capiatur, et destruantur armamenta, rostra vel clavus, malaque proscindatur, utique si tunc evader, debet aestimari navis, in eo statu in quo relicta fuit, ut illud praetium deteriorationis solvat, residuum vero a Magistro [navis] petatur.*'

did not invalidate the undertaking: ‘though the chance of mishap terminates, the *causa* of the promise of the price does not’.⁶⁹ False representation of the value of the thing-at-risk was equally irrelevant, ‘because in contracts of strict law a false *causa* does not avoid the undertaking’.⁷⁰ Once established that the wager was lawful, the court would simply enforce it.⁷¹ Equitable considerations could play no role in it,⁷² and little room was left for a thorough analysis of the will of the parties.⁷³

By contrast, *emptio-venditio* and *locatio-conductio* were both contracts grounded on good faith.⁷⁴ Among the two, *emptio-venditio* was perhaps more open to legal controls, because of the correspondence required between *res* and price. Linking insurance to wager was obvious, but also dangerous: *sponsio* could not be fully controlled. It is no coincidence that the first treatise on insurance, that of Santerna, was entitled ‘*de Assecurationibus et Sponsionibus*’. The ambiguity between *assecuratio* and *sponsio* in the title perfectly matches its content: reading Santerna’s treatise, it is often difficult to neatly distinguish the two contracts. Yet, when defining insurance in legal terms, Santerna opted for *emptio-venditio*. Almost a century later, Stracca had no qualms about explaining insurance in terms of *sponsio* when writing his treatise *de Sponsionibus*.⁷⁵ In that context, insurance was simply used by way of example. But when he devoted a treatise specifically to insurance, Stracca opted for the *emptio-venditio* scheme. The same is true for several other jurists.⁷⁶

A last consideration on the suitability of wager is more ethical. *Sponsio* did not dispel the doubts as to the morality of the agreement. On the contrary, especially if applied to life insurance, it was positively repugnant.⁷⁷

Not all jurists who dealt with insurance felt the need to investigate its precise legal form. If the purpose was simply to justify the premium, it could be sufficient to

69 ‘*Licet cesset periculum, nondum cessat causa promissionis et stipulationis ipsius pretii*’, Santerna, note 25, pt. 3, n. 21, fol. 19r. Many jurists used the same principle to defend the validity of the cargo insurance when both parties were aware that nothing had been laden onboard. In such a case, they argued, the agreement no longer focused on the assumption of the risk, but rather it was a simple wager. See e.g. Lopez, note 45, pt. 2, ch. 16, p. 360; Bañes, note 62, q. 78, art. 4, p. 324; Hevia Bolaño, note 42, lib. 3, ch. 14, n. 17, p. 655; Leys, note 40, lib. 2, cap. 24, dub. 4, n. 28, p. 324-325

70 ‘*Quia in contractibus strictis iuris, falsa causa non vitiat obligationem*’. Santerna, note 25, pt. 3, n. 11, fol. 16v.

71 More in general, it might be interesting to note how the Civilians’ dislike of *sponsio* was only matched by the enthusiasm for penal bonds among litigants, especially at Common law, as the most successful way to ward off interference from the bench.

72 For instance, if the insured agreed to pay the premium but did not load the cargo onboard and notified the insurer, the latter could still claim the premium in full: *ibid.* See also the problems arising from the difference in quantity between the insured cargo and the cargo actually laden onboard, or for the case the cargo insured was already damaged or wasted when laden onboard. In such cases, the jurists resorted to equity to reduce the premium: *ibid.*, pt. 4, n. 56-59, fols. 44v-45r.

73 *Ibid.*, pt. 3, n. 49, fol. 24r.

74 Cf. Luis de Molina (1535-1600), *Disputationes de Contractibus* ..., Venetiis, Apud Matthiam Collosinum, et Baretium Baretium (*sic*), 1601, pt. 2, disp. 507, n. 6, 677-678.

75 Stracca, *de Sponsionibus*, note 61, pt. 11, n. 1, 193-194.

76 For instance, Molina placed wager immediately after insurance, and Scaccia did the opposite. But both defined insurance as *emptio-venditio*. Molina, note 74, disp. 507 (*‘De contractu assecurationis’*, p. 675-680) and disp. 508 (*‘De contractu sponsionis’*, p. 680); Scaccia, note 36, § 1 q. 1, n. 84-127, p. 21-34 (*‘De Sponsione, et Ludo’*), and n. 128-170, p. 34-46 (*‘De Assecuratione’*). Cf. Ceccarelli, note 2, 627.

77 See for all Mazzolini, note 42, *sub* Negotium, q. 4, fol. 344v. One of the few authors who defended life insurance in terms of *sponsio* was Scaccia. But he did so mainly to put as much distance as possible between insurance and loan. Scaccia, note 36, § 1 q. 1, n. 97, p. 25-27, esp. p. 27. The dubious morality of life insurance as wager was by contrast a strong point for the advocates of the *fideiussio* scheme: see e.g. Lopez, note 45, pt. 2, ch. 16, 357-358.

highlight the useful economic function of insurance for commerce,⁷⁸ or just to stress the aleatory nature of the insurer's undertaking.⁷⁹ Often, the same jurist provided several alternative schemes for insurance.⁸⁰ The only limit was loan: whatever the legal relationship between insurer and insured, insurance could be defended so long as it was not qualified as *mutuum*.⁸¹ The insurer's risk was against the very nature of loan (*contra naturam mutui*), and so 'the uncertainty eliminates the vice, or presumption, of usury'⁸² As the *periculum* made the insurer's gain uncertain, and so it removed suspicion of usury, Civilians insisted on the *susceptio periculi* to defend the legitimacy of insurance.⁸³

3. Laying insurance on Procrustes' bed

Wager aside, whatever the contractual scheme adopted (and so the underlying legal reasoning), some practical consequences were the same. Without merchandise laden onboard, the undertaking was void. No *periculum* was actually sold, agreed upon in a *locatio-conductio*, or undertaken as an obligation to do in an innominate contract. In case of *fideiussio* this was all the more apparent, for lack of merchandise meant absence of debtor.⁸⁴ The same applied to the case where the mishap was imputable to the insured (either as *culpa* or, even more, as *dolus*). Whatever the contractual scheme

78 E.g. E.g. Johan Marquard (1610-1668), *Tractatus Politico-Juridicus de Iure Mercatorum et Commerciorum Singulari* ..., Francofurti, Ex Officina Thomae Matthiae Götzii, 1662, lib. 2, ch. 13, n. 4 and 9, p. 330 and 332 respectively. See further Ceccarelli, note 2, 629-630; Cassandro, "Note Storiche sul Contratto di Assicurazione", *Assicurazioni* 26 (1959), 16-57, at 17-19.

79 E.g. Peter Binsfeld (Petrus Binsfeldius, 1545-1598), *Commentarius theologicus et juridicus in titulum juris canonici de usuris*, 1593, ch. 19, q. 2, p. 527-528.

80 So, for instance, for Salón, note 47, § *Disputatio de Contractu Assecurationis*, art. 1, n. 3, p. 677, insurance could be a *locatio-conductio* (specifically, '*contractus commissionis*'), but also a *fideiussio* (*ibid.*), and possibly also a case of *emptio-venditio* (*ibid.*, n. 5).

81 Cf. Lupo, note 42, *Commentarius tertius*, § 1, n. 15-16, fol. 96r; Agostino Beró (Augustinus Beroius, 1474-1554), *Consiliorum sive responsorum Avgvstini Beroii Bononien.* ..., vol. 1, Venetiis, apud Franciscum Zilettum, 1577, cons. 168, n. 1, p. 625.

82 Stracca, *De Assecurationibus*, note 39, praefatio, n. 35, fol. 22r-v: '*Diversa ergo est ratio inter emptionem et venditionem et mutuum. In emptione enim incertitudo tollit vitium seu praesumptionem usurae: Contra vero in mutuo, in quo vitium usurarum non purgatur, licet periculum ad creditorem pertineat [...] diversitatis rationem esse, quis contractus mutui magis proximus est usurae, quam alii contractus. Nam in contractu mutui usura vere et proprie quo ad formam et re ipsa contrahitur: sed in aliis velut in contractu emptionis licet re ipsa et improprie usura contrahi dici possit; tamen quo ad sui formam et proprie non contrahitur*'. Cf. esp. Santerna, note 25, pt. 1, n. 5-12, fols. 4r-5v.

83 Virtually all jurists stressed the point. Perhaps the clearest explanation from a legal standpoint is that of Lupo, note 42, *Commentarius tertius*, § 1, n. 14-15, fol. 95r-v. See also the sharp remarks of Molina, note 74, pt. 2, disp. 507, n. 2, p. 675-676. Cf., *inter alios*, Perez, note 34, ad C.4.33, n. 3 and 6, p. 191-192; Mattheus van Wesenbeek (Matthaeus Wesenbeck, 1531-1586), *Matthaei Wesenbecii Paratitla in Pandectas Iuris Civilis* ..., Basileae, 1566, ad D.22.2, n. 3, p. 273; Beró, note 81, cons. 168, n. 7, p. 626; Guilielmus Cornhuysius (d. 1617?) *Digestorum seu Pandectarum Iuris Ciuilis Partitio et Methodus* Antverpiae, ex officina Christophe Plantin, 1565, p. 66-67; Hendrik Zoes (Henricus Zoesius, 1571-1627), Henr. Zoesii ... *Commentarius ad Digestorum seu Pandectarum Iuris Civilis Libros L* ..., Lovanii, Typis ac Sumptibus Hieronymi Nempaei, 1667, ad D.22.2, n. 3-4, p. 466-467; William Welwod (1578-1622), *An Abridgement of All Sea-Lawes*, London, Lownes, 1613, tit. 14, p. 37; Covarrubias, note 55, fols. 174v-175r.

Incidentally, in the same period the *susceptio periculi* was employed also to shield the *foenus nauticum* from usury accusations. See e.g. Paul van Christynen (Paulus Christineus, 1543-1631), *Practicarum Quaestionum Rerumque in Supremis Belgarum Curiis Iudicatarum Observatarumque*, vol. 3, Antverpiae, apud Hieronimum et Ioannem Bapt. Verdvssen, 1660, tit. 33, dec. 47, n. 4, p. 548.

84 García, note 52, cap. 15, n. 455, p. 475-476.

chosen for insurance, the imputability of the mishap to the insured would exonerate the counterparty.⁸⁵ This was the case even for wager: ‘broad as it may be, the *sponsio* formula could not be shaped so that the promissor insured against the fraud or fault of the promisee’.⁸⁶ More precisely, in a *sponsio* the condition that fails to materialise (e.g. the safe arrival of the thing-at-risk) because of the fact of the promisee is to be considered as having occurred.⁸⁷

Beyond these and similar scenarios the choice of a contractual scheme did have important consequences. A few times, they were advantageous. It is the case, for instance, of *emptio-venditio* of the thing-at-risk (as opposed to the risk in it) and *fideiussio*. Considering the insurer as the owner of the thing-at-risk until its safe arrival at destination, as Bosco did, had a practical advantage: it allowed the insurer to vindicate the ownership of any part of the insured cargo that had not perished in the shipwreck.⁸⁸ This way, the insurer was entitled to claim whatever was left of the cargo (or ship) insured after having paid for its whole value to the insured. Such was the practice among merchants: upon recovery, the insured would transfer his rights on the insured thing to the insurer, so to allow him to recover (and sell) it, thereby reducing his loss. If the insurer was already the owner of the thing, then he could proceed with the recovery at once, without having to wait for the insured’s waiver. *Fideiussio* reached the same purpose, because of the right of recourse of the guarantor on the main debtor (the insured thing). This way, the insurer-guarantor could claim

85 See Santerna, note 25, pt. 3, n. 46-48, *fols.* 23v-24r, and esp. pt. 4, n. 15-17, *fols.* 35v-36r, and n. 29, *fol.* 39r; Stracca, *De Assecurationibus*, note 39, gl. 20, n. 4, *fols.* 114v-115r; Scaccia, note 36, § 1, q. 1, n. 154, p. 42; Perez, note 34, *ad* C. 4.33, n. 4, p. 191; Denis Godefroy, *Codicis Dn. Iustiniani ... Libri XII ...*, Lugduni, in officina Barthol. Vincentij, 1583, *ad* C.4.33.4, § *amissarum* (lit. q), col. 312; Molina, note 74, pt. 2, disp. 507, n. 2, 676; Welwod, note 83, tit. 14, p. 37; Christynen, note 83, tit. 33, dec. 47, n. 5, p. 548. See also Agostinho Barbosa (1590-1649), *Collectanea in Codicem Iustiniani ...*, Ludguni, sumptibus Anisson, et Possuel, 1720, vol. 2, *ad* C.4.33.4, § *Cum proponas*, n. 1-8, *fol.* 153r-v, with a particularly large (and accurate) number of references to Civil lawyers.

86 ‘*Quamvis enim latissime concept sit formula sponsionis [...] ita tamen concepta non est, imo concipi non potuit, ut dolum ac culpam stipulantis assecurationem sponsor praestare debeat*’, Wamèse, note 63, centuria 4, cons. 25, proem. and n. 1, p. 67. Wamèse was particularly clear on the point, perhaps because he was counsel for the insurer. The other counsel was another law professor and colleague of Wamèse at Leuven, Elbert de Leeuw (Elbertus Leoninus, 1520-1598). Leeuw was more detailed on the point: ‘*Quamvis enim latissime concepta sit formula sponsionis: ita ut vix ullus sit casus eventuri periculi, qui ea non comprehendatur, sive is sit plane fortuitus, sive ex tertij alicujus facto, etiam improbabilis, provenientis, et qui alioqui in simplici assicuratione, seu sponsione non facile contineretur; ita tamen concepta non est, imo concipi non potuit [...] ut dolum ac culpam stipulantis assecurationem sponsor praestare debeat: ideoque in generali, effusaque periculi quomodocunque contingentis promissione, non continetur illud periculum, ac damnum, quod facto aut culpa stipulantis contingit, sed illud exceptum semper intelligitur, quasi illiberale et contra bonos mores sit, facti proprii poenam in alterius detrimentum, et damnum convertere, et ex huiusmodi stipulatione dolum et culpam affectandi occasionem praeberet*’. Leeuw, *Centuria consiliorum clarissimi jurisconsulti Elberti Leonini ...*, Arnheimii, ex officina Joannis Jacobi, 1656, cons. 23, proem. and n. 1, 255-256.

⁸⁷ E.g. Santerna, note 25, pt. 3, n. 25 and 26-29, *fols.* 19v-20v. Cf. Barbosa, note 85, *ad* C.4.33.4, § *Cum proponas*, p. 152.

⁸⁸ Bosco, cons. 391, n. 2, p. 612: ‘*Item per viam verae venditionis mercium resolvendae sub conditione assecurationem contrahunt, quod probatur ex communi observantia tali, quia si contingat res illas, super quibus est facta securitas, capi, dictae res tanquam effectae assecurationum pro parte, qua assecuraverunt super ipsis, per eos vendicantur, et recuperantur, et de ipsis, tanquam de propriis disponunt, quasi tanquam res venditae ex die contractae assecurationis tot viago fuerint ipsorum emptorum, et assecuratorum periculo*’. The point has been widely studied: see E. Bensa, *Il contratto di assicurazione nel Medio Evo: studi e ricerche*, Genoa, Tipografia Marittima Editrice, 1884, p. 134; G. Bonolis, *Svolgimento storico dell’assicurazione in Italia*, Florence, Galileiana, 1901, p. 32; F. Edler-de Roover, ‘Early Examples of Marine Insurance’, 5 *Journal of Economic History* (1945), p. 186.

whatever was left of the cargo or ship insured after having paid for its whole value to the insured.⁸⁹

In many important cases, however, no contractual scheme would entirely suit insurance. Or rather, in order to do so, Civilians had to be considerably flexible with the contractual scheme of their choice.

A good example is the issue of the insurable value, especially with regard to the value at destination. The *emptio-venditio* scheme focused on the *rei aestimatio*. In Leys' definition of insurance, the insurer 'undertakes to pay the value of the thing in case it perished' ('*se obligat ad solvendum rei aestimationem, in eventum quo perierit*').⁹⁰ This however presupposed that the object of the contract was the value of the thing-at-risk at the moment of the sale. A first consequence was that the thing had to be in existence at the moment of the contract. Stracca was particularly clear on the point. If the insurance is a contract of sale, and its object is the value of the thing-at-risk, then the thing must exist when the contract is made. Otherwise, the sale would be an *emptio spei*.⁹¹ Moving from Bosco's sale of the thing-at-risk to Santerna's sale of the risk in the thing offered many advantages, but it could not be pushed too far. The *periculum susceptum* by the insurer was limited in time: within a certain period it would either materialise or disappear. But it was necessary that the risk existed at the moment of the contract. To this end, it was essential that the thing also existed.⁹² The jurists who analysed insurance in terms of *emptio-venditio* were keen on the point, for this distinguished insurance from wagers at large. If the *rei aestimatio* was 'sold' when the policy was made, then it ought to refer to the value of the *res* at the moment of departure, not of arrival of the ship.⁹³ In other words, the *emptio-venditio* model conditioned the insurable value, 'because the valuation takes the place of the thing'.⁹⁴ As the policy could not exceed the cost price, it was not possible to insure the value at

89 García, note 52, ch. 15, n. 453, p. 475: '*De aquí nace que cuando la cosa asegurada se pierde, todo lo que de ella queda salvo se entrega al asegurador, para que de allí rehaga su daños, o en todo, o en parte, según que fuere possible.*'

⁹⁰ *Supra*, note 40.

91 Stracca, *De Assecurationibus*, note 39, praefatio, n. 13, fol. 13v: '*quia emitur alea, hoc est spes rei, non dicitur periculi pretium, sed rei non existentis, et rei quae in spe est emptio*'. See further *ibid.*, n. 46, fol. 26v. As we will see, when applied to insurance, the *emptio-venditio* scheme could not be fully separated from *emptio spei*. This is probably why a jurist as careful as Molina, note 74, pt. 2, disp. 507, n. 2, 675, was clear to shape the *emptio-venditio* of the *periculum* to the *emptio spei* model.

92 Stracca, *De Assecurationibus*, note 39, praefatio, n. 13, fol. 13v: '*Licet nec emptio nec venditio sine re quae veneat, possit intelligi, aliquando tamen sine re venditio intelligitur, veluti cum quasi alea emitur, quod sit cum captus piscium et avium, quia spei emptio est*'.

⁹³ *Ibid.*, gl. 6, n. 1, fol. 51r: '*Quoniam licet conditionalis sit contractus, considerato adversae fortunae casu, non tamen assecurator dicitur debitor rei sub conditione vel modo [...] sed semper dicitur debitor aestimationis ad quam se obligavit, quae aestimatio certa est*'.

94 Santerna, note 25, pt. 4, n. 57, fol. 45r: '*sicut ille qui habet extimationem rei dicitur fecte habere rem [...] ita possumus dicere, quod promittens extimationem fecte, censetur promittere rem, et in eo possit habere locum dispositio [...] quia aestimatio succedit loco rei*'. See also *ibid.*, pt. 3, n. 42, fol. 23r: '*licet iste contractus [assecurationis] ut pluries dixit sit conditionalis habito respectu ad adventum periculi, tamen non potest dici debitor rei, sub conditione vel modo [...] sed semper dicitur debitor illius extimationis quam promittit quando se obligat, quae extimatio erat certa quando promittitur quanti res est [...] quod hic debetur extimatio iure obligationis, eo quod principaliter ad eam se obligat, et sic inspicitur tempus contractae obligationis*'. Cf. Stracca, *De Assecurationibus*, note 39, gl. 6, n. 3, fol. 52r: '*verum dici posset spectari tempus emptionis in casu nostro, non illud quo merces emptae sunt, à dominis, sed quo assecurationis contractus celebratus est, contractus namque iste (ut non semel dixi) similis est emptioni, et merito inspicitur tempus quo pretio periculum emitur, vel diem tempus contractae obligationis super assecuratione spectandum, [...] ut damnum emendetur ratione contraxtus super assecuratione, quasi contrahentes ad tempus contractae obligationis se retulerint*'.

destination.⁹⁵ Of course the parties could inflate the value of the thing-at-risk. But this ill-suited the scheme of *emptio-venditio*, for it relied on the fact that only an exorbitant disproportion between value agreed upon and actual value would trigger the *laesio aenormis* mechanism.⁹⁶ Insuring the value at destination was not fully compatible with the *emptio-venditio* scheme⁹⁷ – it might have suited more the *locatio-*

95 Santerna, note 25, pt. 3, n. 40-46, *fol.* 22v-23v; Stracca, *De Assecurationibus*, note 39, gl. 6, n. 1-3, *fol.* 50v-52v; Scaccia, note 36, § 1, q. 1, n. 169, p. 44-45.

96 Santerna, note 25, pt. 3, n. 45-46, *fol.* 23r-v, and pt. 5, n. 1, *fol.* 48r; Stracca, *De Assecurationibus*, note 39, gl. 6 n. 4, *fol.* 53r; Ripoll, note 47, ch. 21, n. 131, p. 232; Beró, note 81, cons. 168 n. 5, p. 626; Scaccia, note 36, § 1 q. 7, pt. 2, *ampl.* 10, n. 14, p. 331 (for a lengthy review of juristic debates on the point see *ibid.*, n. 5-7, p. 322-329). A dissenting voice on the point was that of Rocco. According to him, the *laesio aenormis* remedy could not be invoked in insurance matters, because the insurer knew from the beginning that his premium would amount to far less than the value of the insured thing. Accordingly, 'the said remedy does not apply where both parties were aware of that' (*dictum remedium non habet locum inter scientes*'), Rocco, note 41, not. 7, n. 15, p. 394. Strictly speaking, Rocco had a point in law. If insurance fell within the sale scheme, then the premium was the *pretium* paid for the *rei aestimatio*. In practice, the premium was discounted after the expected probability of mishap. So it would typically amount to just a little part of the value of the insured thing. But this discounting operation was alien to the *laesio aenormis* principle. As such, the disproportion between *pretium* and *rei aestimatio* ought to trigger the *laesio* mechanism. Rocco avoided this unfortunate conclusion by invoking the 'inter scientes' principle. But his argument is rather telling about the limits of the *emptio-venditio* scheme.

97 Santerna, note 25, pt. 3, n. 41, *fol.* 22v, argued that the insurance value (the *rei aestimatio*) was to be reckoned according to whether the warranty focused on the value of the thing or on its safe arrival at destination: '*aut qui promittit salutem mercium in certo loco, ut puta Vlisbonae, et tunc eius loci existimatio inspicienda est [...] aut non promisit dare merces salvas in certo loco: sed tantum extimationem, vel valorem merciorum in casu periculi scilicet si navis periret, ut fieri solet etiam inspicere debet tempus obligationis, et sic prout tunc valebant, debet fieri extimatio*'. The cost price reckoning had sound basis: '*quia tunc extimatio debetur iure obligationis, et sic videtur permitti id quod tunc valebant [...]* Item qui procurat in adventu periculi extimationem rerum suarum videtur magis providere damnum ne patiat in ammissione (sic) rerum non autem considerat lucrum, et per consequens venit illud in quo tunc damnum sentire potest quando stipulatur, et non venit lucrum' (*ibid.*). But Santerna found a legal ground for the value at destination as well. Since the object of the insurer's obligation was the *rei aestimatio*, nothing prevented the parties from agreeing to a different *aestimatio* than the price cost: '*licet iste contractus ut pluries dixit sit conditionalis, habito respectu ad adventum periculi, tamen [assecurator] non potest dici debitor rei sub conditione vel modo [...] sed semper dicitur debitor illius extimationis quam promittit quando se obligat*' (*ibid.*, pt. 3, n. 42, *fol.* 23r). The proof that something might be valued at its price at destination was found in the law on jettison (the *lex Rhodia de iactu*, D.14.2.2.4), where the remaining part of the cargo (i.e. that which was not jettisoned) is to be reckoned at its value at destination (*ibid.*, pt. 3, n. 40, *fol.* 22v).

Santerna's argument was the object of a lengthy critique by Stracca, *De Assecurationibus*, note 39, gl. 6, n. 2-4, *fol.* 50v-52v. According to Stracca, Santerna's conclusions were not compatible with *emptio-venditio* (unless moving to *emptio spei*). For it was possible to shape the *susceptio periculi* as sale of the *rei aestimatio* so long as the value of the *res* was reckoned at the moment of the contract. If the sale took place at the moment of the insurance, then the value of the thing (the *rei aestimatio*) would necessarily refer to the same time: '*Dixerit aliquis ergo in quaestione proposita spectandum erit emptionis tempus, non autem contractae obligationis [...] verum dici posset spectari tempus emptionis in casu nostro non illud quo merces emptae sunt, a dominis, sed quo assecurationis contractus celebratus est, contractus nanque iste (ut non semel dixi) similis est emptioni, et merito inspiciatur tempus quo pretio periculum emitur, vel diem tempus contractae obligationis super assecuratione spectandum [...] ut damnum emendetur ratione contractus super assecuratione, quasi contrahentes ad tempus contractae obligationis se retulerint*', *ibid.*, n. 3, *fol.* 52r. Further, argued Stracca, the jettison case is conceptually different from insurance, and could not be invoked in support of Santerna's interpretation. The jettisoned cargo is reckoned at its cost value, but the part of the cargo which arrives safely at destination is valued after the higher price it now commands. The reason, Stracca explained, is to share the loss more equally among the merchants involved, for the loss is to be divided among all merchants proportionally to the value of their goods. The owners of the safe goods would thus pay more than the owners of the jettisoned ones. Thus, the mechanism is based on fairness: since

conductio model, short of the obvious *sponsio* alternative.

Other attempts to reconcile the *emptio-venditio* model with the insurability of the value at destination resulted in yet more convoluted arguments, or in their complete absence. For instance, after having used the same definition as Lessius on insurance as *emptio-venditio* of the *rei aestimatio* (and so, based on the cost price of the *res*),⁹⁸ Rocco then nonchalantly argued that the insurance could also be considered as *emptio spei*, and so it was possible to give a different value to such *spes* – the value the cargo would have if it reached safely its destination.⁹⁹ Following Santerna's scheme¹⁰⁰ – by then, a *topos* – Scaccia concluded that one thing was to insure the value of the thing, another to guarantee the safe arrival of the *res* at destination.¹⁰¹ Scaccia was however aware that the second case looked more as *emptio spei* and so it could not easily be reconciled with the definition of insurance as sale of the *rei aestimatio*. So he just referred the reader to the opinions of Santerna and Stracca – who, incidentally, were in open contrast with each other on the point.¹⁰² Ansaldi sought to solve the problem by using *emptio spei* without mentioning it overtly.¹⁰³ The approaches of Rocco, Scaccia and Ansaldi on the insurability of the value at destination highlight the underlying legal (and logical) problem. The more the accent fell on the value of the goods at destination, the more it moved away from the thing-at-risk.¹⁰⁴ *Rei aestimatio* and *emptio spei* are not fully compatible with each other. More precisely, *emptio spei* is conceptually a case-limit within *emptio-venditio*: it is not possible to use it as the default scenario of a sale agreement – let alone of the contract of insurance – without mentioning it expressly. Yet, if one is to rely on *emptio spei* overtly to justify insuring the value at destination, then it is extremely difficult to reconcile its use with the standard definition of insurance as (normal) *emptio-venditio*, based on the sale of the *rei aestimatio*. Trying to use *emptio spei* in a somewhat furtive way is understandable, but it is equally dangerous. In the insurance context, it blurs the difference between *emptio-venditio* and wager.

Qualifying insurance as the sale of the *rei aestimatio* had its problems.¹⁰⁵ By contrast, the *sponsio* scheme perfectly suited the insurability of the value at destination. As

jettisoning necessarily entails a discrimination between different goods, some compensation ought to be given to the owners of the merchandise sacrificed. The legal (and logical) basis is therefore wholly different from that of insurance, and so it cannot be applied by analogy to it (*ibid.*, n. 2-3, *fols.* 51r-52r).

⁹⁸ *Supra*, note 40. See further Rocco, note 41, not. 4, n. 8, and not. 6, n. 13, both at p. 394.

⁹⁹ *Ibid.*, not. 7, n. 17-18, p. 394: '*quia assecurator vendit tantum spem futuri eventus, quae potest, de iure, vendi [...] non enim hic aestimatur quantum merces valent in adventu periculi, sed quantum aestimaretur dubius ille eventus, quo casu videtur constituti illud pretium respectu illius spei, non respectu aestimationis mercium, quando postea evenit.*'

¹⁰⁰ Santerna, note 25, pt. 3, n. 40-442, *fols.* 22v-23r. Cf. e.g. Stracca, *De Assecurationibus*, note 39, gl. 6, n. 1, *fols.* 50v-51r; Rocco, note 41, not. 31, n. 100-103, p. 401.

¹⁰¹ Scaccia, note 36, § 1, q. 1 n. 169, p. 45. Scaccia's reasoning was hardly original – it followed the scheme proposed by Santerna (note 25, pt. 3, n. 40-442, *fols.* 22v-23r) and then used by Stracca (*De Assecurationibus*, note 39, gl. 6, n. 1, *fols.* 50v-51r).

¹⁰² *Ibid.* On the divergence between Santerna and Stracca see *supra*, note 97.

¹⁰³ Ansaldi, note 47, disc. 70, n. 30-31, p. 430.

¹⁰⁴ Cf. Santerna, note 25, pt. 3, n. 40-42, *fols.* 22v-23r; Stracca, *De Assecurationibus*, note 39, gl. 6, n. 1, *fols.* 50v-51r.

¹⁰⁵ Another consequence of the *rei aestimatio* as the object of the insurance-sale became apparent only later, with the enormously influential treatise of the Genoese lawyer Giuseppe Maria Casaregis (1670-1737). If the object of the insurance was the value of the thing-at-risk and not the insured's interest in it, then only the owner could validly insure. Casaregis, *Josephi Laurentii Mariae De Casaregis ... Discursus Legales de Commercio*, Florentiae, apud Jo. Cajetanum Tartinium, & Sanctem

Santerna had it, 'if my things were to perish, you will give me a thousand; in such case there is no issue'.¹⁰⁶ One of the advantages of *sponsio* was that, as a simple wager, no correlation was needed between the wager's amount and the value of the thing-at-risk. Yet, insisting on the abstractness of the wager was not easily reconcilable with the attempts of some scholars to shape it as *susceptio periculi*. If the insurance-wager was made 'because of the *periculum* that the promisors [...] accepted',¹⁰⁷ it was difficult to separate the amount of the wager from the value of the thing-at-risk.¹⁰⁸ Ultimately, this depended on the ambivalent meaning of *pretium periculi* in the Digest (D.22.2.5 pr.), as we have seen earlier.

In theory, both *locatio-conductio* and *fideiussio* schemes should have been more fortunate on the subject of insurability of the value at destination. In both cases the accent is on the guarantee, not on the thing-at-risk. It follows that the amount of the guarantee does not have to be necessarily the same as the value of the thing. The *pretium periculi*, in other words, could be higher than the *rei aestimatio*. Effectively, this was the case with *locatio-conductio*: the service undertaken by the *conductor* was to guarantee the safe arrival of the thing. Yet, as we have seen, *locatio-conductio* was the least fortunate contract in terms of advocates, and they did not elaborate much on the point.

The *fideiussio* scheme should have perfectly suited the insurability of the value at destination. If the insurer guaranteed the safe arrival of the thing, then he was answerable for the value the thing would have had at destination. However, no advocate of the *fideiussio* scheme said expressly as much. At first sight, the silence might appear odd. Yet, it was justified: *fideiussio* could well cover *lucrum cessans* in general, but not when applied to insurance. In principle, the value of the *fideiussio* could well be higher than that of the underlying debt. The only limit was that, in such case, the *fideiussor* could not swear an oath. For the oath referred to his guarantee of the debt, and so it could not exceed its value. Now, *fideiussio* could be applied to insurance so long as the *fideiussor* did not enjoy the privilege of being asked to pay only after the main debtor had defaulted (*beneficium excussionis*). As the main obligor was the thing-at-risk, it was necessary that the *fideiussor* did not enjoy such privilege – lest the entire construction would collapse.¹⁰⁹ The problem was that the

Franchium, 1719, disc. 4, esp. n. 1, 5 and 9, pp. 23-25. Admittedly, Casaregis' was a somewhat drastic position, but it soon became authoritative: see e.g. Ascanio Baldasseroni (1751-1824), *Delle Assicurazioni Marittime*, Firenze, Stamperia Bonducciana, 1786, vol. 1, pt. 1, tit. 1, n. 20-25, pp. 34-37, and pt. 2, tit. 5, n. 7-15, pp. 180-195. Still, it should be noted that most (if not all) of the previous jurists seem to have thought of the insured always as the owner or his agent (or at the most as the only co-owner who wanted to insure the thing in common: Stracca, *De Assecurationibus*, note 39, gl. 10, n. 1-8, fols. 63v-66r).

Earlier authors had not worked out in full the implications of the *emptio-venditio* scheme. Both Santerna and Stracca had simply invoked the freedom to contract without looking at the specific effects of the sale scheme (based as it was on ownership) on the capacity to insure. Santerna, note 25, pt. 5, n. 10-11, fol. 50r-v: '*non potest assecurator opponere assecurato, quod merces non erant suae [assecurati] [...] quia super re aliena quis potest contrahere*'; Stracca, *De Assecurationibus*, note 39, gl. 10, n. 5, fol. 65r: '*qui convenitur ex contractu non potest referre quaestionem Dominij [...] agenti ex contractu, opponi non posse, quod non sit dominus, vel quod alter sit dominus; quia licet alius sit Dominus: tamen contractus consistit*'. Cf. Rocco, note 41, not. 46, n. 150-153, p. 405, and not. 94, n. 365-366, p. 419, and Ansaldi, note 47, disc. 12, n. 3, 5-6, 11-13, 17, p. 62-65.

106 'Si res meae peribunt, dabis mille, et in hoc casu nulla est dubitatio', Santerna, note 25, pt. 3, n. 43, fol. 23r. Cf. Stracca, *De Assecurationibus*, note 39, gl. 6, n. 4, fol. 52v (rightly referring to D.45.1.52); Rocco, note 41, not. 32, n. 104, p. 401; Scaccia, note 36, § 1, q. 1 n. 169, p. 45.

107 Stracca, *supra*, note 66.

108 Stracca, *De Assecurationibus*, note 39, gl. 6 n. 4, fols. 52v-53r.

109 *Supra*, note 51.

beneficium excussionis would apply to the *fideiussor* unless he swore an oath on the guarantee.¹¹⁰ As such, the advocates of the *fideiussio* scheme prudently overlooked the issue of the insurable value.

Another issue was the case of insurance after loss. Rather frequent in practice (often the insured did not know when the ship would set sail, or he would become anxious about its tidings), insurance after loss was problematic, especially for the *emptio-venditio* scheme. For if the thing was already lost, then there was no longer any *periculum* to transfer.¹¹¹ However, while the jurists agreed that previous knowledge of the mishap on the part of the insured avoided the insurance, they were equally clear to defend the contract if the parties were ignorant about the ship's tidings.¹¹² Yet, the legal principle did not change according to the knowledge of the mishap. In either case, no risk was left. The jurists insisted on the subjective ignorance so to compensate for the lack of objective uncertainty. But, in point of law, this would have suited more a wager than a contract of sale.¹¹³ Within the sale model, it was more a case of *emptio spei*. Ironically, the reason why Stracca dismissed the *spes* as the object of the sale when introducing insurance as *emptio-venditio* would have now suited very well the case of insurance after loss. The reality of the *periculum*, argued Stracca, depends on the existence of the *res*. Buying the chance that a thing materializes (*rei spes*) is therefore different from buying the *pretium periculi*. In case of *emptio spei* the *pretium* does not refer to the (actual) *periculum*, but rather to the thing which might or might not come into existence.¹¹⁴ When dealing with insurance after loss, however, Stracca shifted the focus from the actual (and present) risk to the

110 E.g. Antonio Petrucci (1390-1464), *Repetitio Solemnis et Perutilis L. I. ff. de iureiurando*, Helmstadii, ex officina Iacobi Lucij Typographi, 1592, § *Sextus Effectus Iuramenti*, fols. 53-55, and Ippolito de' Marsili (1450-1529), *De Fidejussoribus*, in Antonius Heringuis, ed., *Tractatus de Fideiussoribus*, Genevae, sumptibus Leonardi Chouër, 1675, n. 291, p. 461.

111 Leys, note 40, lib. 2, cap. 24, dub. 4, n. 25, p. 324: '*impossibile enim est praestare periculum rei, ubi iam res perijt.*' Representing the insurer, Leeuw, note 86, cons. 22, n. 2-4, 249-250, was more elaborate on the point: '*Assecurationem contractam, aut tempore Assecurationis imminente periculo intelligitur, nec ad praeteritum damnum seu periculum extendi potest. Nam praeteriti periculi susceptio, ac rerum jam deperditarum, et quas jam periisse (sic) in rerum natura certum est, promissa securitas, ex juris communis dispositione nullius momenti esse: tum quia res, ad quam sit securitatis promissae relatio, tempore quo sit promissio non existit, aut non est in nostro commercio [...] tum quia nihil continet praeter aleam ac vanae sponsionis speciem, quae non fundatur super aliqua justa causa, sed dumtaxat super inopinata ac inconsulta capione ac supergressione alterius contrahentium, quae tanquam Reipublicae damnosa, et ad inconsultos contractus respiciens, a jure non probatur.*'

112 E.g. Leys, note 40, lib. 2, cap. 24, dub. 4, n. 26, p. 324; Scaccia, note 36, § 1 q. 7, pt. 2, *ampl.* 10, n. 19-21, p. 331-332.

113 '*Assecurationis contractus valeat: sicut in contractu sponsionis [...] de re aliqua preterita, satis est, si incerta sit utrique contrahentium*', Molina, note 74, pt. 2, disp. 507, n. 3, p. 676. The issue is lucidly explained in Johan Locken (Johannes Loccenius, 1598-1677). After a long argument on the invalidity of insurance after loss, Loccenius closed the matter simply referring to wager. Shaped as a *sponsio*, no objection would stand against insuring after the mishap. Loccenius, *De Iure Maritimo libri tres*, in F. Stypmann, *Scriptorum Iure Nautico et Maritimo Fasciculus*, Halae Magdeburgicae, sumptibus Orphanotrophei, 1740, lib. 2, ch. 5, n. 9, p. 984.

114 Stracca, *De Assecurationibus*, note 39, praefatio, n. 13, fol. 13v: '*Aleam emere, hoc est incertum rerum eventum [...] Licet nec emptio nec venditio sine re quae veneat, possit intelligi, aliquando tamen sine re venditio intelligitur, veluti cum quasi alea emitur, quod sit cum captus piscium et avium, quia spei emptio est. Dum ergo in d. l. periculi [D.22.2.5] dicitur, si modo in speciem aleae non cadat; exponendum est, nisi in speciem illam emptionis cadat, incertumque rei eventum. et quod hic fit versus sensus, indicant exempla subjecta, et illud maximè, si Piscatori erogatur in apparatus plurimum pecuniae, ut si cepisset, hoc enim casu, seu casibus: quia emitur alea, hoc est spes rei, non dicitur periculi pretium, sed rei non existentis, et rei quae in spe est emptio.*' Cf. *supra*, note 97.

abstract possibility of mishap (that is, from *periculum* to *eventus*).¹¹⁵ In the ignorance of the parties, he claimed, the *eventus* would still remain possible despite it referred to the past. From a legal standpoint, the argument was not entirely persuading, for it implicitly moved from *emptio-venditio* (even of just a *spes*) to wager.¹¹⁶ Scaccia realised the problem but could not avoid it entirely. It is possible to insist on the *eventus* downplaying the existence of the actual *periculum* only if the existence of the object is itself aleatory. Hence, Scaccia argued for the validity of insurance after loss by considering the thing-at-risk as '*res incerta et dubia*'.¹¹⁷ The argument is based on the similarity between wager and insurance so as to extend the broader scope of the former to the latter. But it does not offer any logical reason for the analogy, all the more given the wholly different juridical structure of the two contracts.¹¹⁸ Worse, it seems to blur the difference between *emptio periculi* (referring to an existing thing) and *emptio spei*, creating a sort of *emptio periculi sperati*. Which, needless to say, went entirely against Scaccia's own definition of the object of insurance as the undertaking to pay for the value of the thing-at-risk ('*obligat[io] ad solvendum rei aestimationem*').¹¹⁹

The case of insurance after safe arrival was symmetrical with that of insurance after loss, so it presented the same problem. Arguing for the invalidity of the contract in case the insurer had previous knowledge of the safe arrival of the ship, the advocates of the *emptio-venditio* scheme insisted on the lack of objective *periculum*. The insurance is void, wrote Leys, 'because the obligation undertaken by [the insurer] is worthless'.¹²⁰ Yet, by the same token, the obligation undertaken after the *res* had already perished (the insurance after loss) should have similarly been considered worthless. The only author coherent on the point was Rocco, who reached the same conclusion (on the lawfulness of the policy) both for insurance after departure and

115 Stracca, *De Assecurationibus*, note 39, gl. 27, n. 4, fol. 110r: '*incertus namque dubiusque eventus emitur et periculi precium in re incerta praestatur.*'

116 *Ibid.*, gl. 27, n. 5-6, fols. 120v-121r. It is particularly interesting to note that Stracca, subtle jurist as he was, does not offer a legal argument in support of his conclusion, but relies only on customs and fairness. He was hardly the only one: see e.g. de Ripoll, note 47, ch. 21, n. 80-82, p. 225.

117 Scaccia, note 36, § 1, q. 7, pt. 2 *ampl.* 10, n. 21, p. 332.

118 *Ibid.*, n. 21-22, p. 332: '*assecuratio et sponsio in substantia conveniunt [...] Sed sponsio potest fieri de re incerta, et dubia, tam si sit de re dubia futura [...] quam si sit de re dubia praesenti, vel praeterita [...] quia sponsio est species ludi [...] sed ludus ex sui natura ita potest esse de re futura, sicut de re praeterita: admitto tamen, quod in sponsione de re praeterita, vel praesenti facilius committi potest fraus, quam in sponsione de re futura. Ergo etiam assecuratio potest fieri de re praeterita; et ita servatur, quia sufficit, risicum semel extitisse.*' What is interesting to observe is that Scaccia's discussion about insuring something which might not exist is divided in two cases. The first is about the validity of the insurance after loss, the second whether the insurance on a larger quantity of merchandise than that effectively laden onboard is valid. The first issue is dealt with in a few lines, then the author moves immediately to the second, dealing with it for several pages (*ibid.*, esp. n. 22-38, p. 332-336). Of course also this second issue was important, but far easier to solve in law. The whole arrangement leaves the reader with the clear impression that the author was trying to shift the subject to something easier to discuss. Moving from the premise that both issues stemmed from the same legal problem and focusing on the second with long and erudite juridical arguments, the entire problem would hopefully look satisfactorily concluded.

119 *Supra*, note 41.

120 Leys, note 40, lib. 2, cap. 24, dub. 4, n. 24, p. 324, '*quia obligatio, quam in se suscipit, nullius est pretij.*' Molina went further: since the premium depends on the *periculum*, there has to be some proportionality between the two. Hence, if the insurer knew that the ship was close to destination (but not yet arrived), he ought to return part of the premium because of the lower risk. Molina, note 74, pt. 2, disp. 507, n. 3, p. 676.

insurance after safe arrival.¹²¹ But Rocco's coherence came at the price of a higher incongruity – his easiness to move from proper *emptio-venditio* to *emptio spei*. The list of insurance-related matters hard to reconcile with Civil law could continue,¹²² but listing them all was not our purpose. Incongruities aside, abstract contractual schemes had also other problems: they were too broad. For instance, it was difficult to argue for the exclusion of the fraud of the shipmaster (barratry), even though in practice barratry was included in the policy only if expressly agreed upon. From a legal perspective, the shipmaster was a third party. His liability therefore was not a defence for the insurer to avoid paying the insured.¹²³

4. Concluding remarks

Accusing some among the most brilliant legal minds in early modern Europe of poor understanding of basic legal principles would be ridiculous. They must have realised the possible objections to their theories. But the only way to avoid such objections would have been to reconsider the legal models applied to insurance. Faced with this trade-off, they showed no hesitation in keeping the abstract model. And yet, when looking at practical issues arising in insurance matters, they were equally ready to detach themselves from those abstractions. It would seem that they considered the two subjects somewhat independent of each other. First came the need to provide a Civil law scheme for the insurance contract. Then, having secured this new business practice on safe ground, Civilians proceeded to analyse practical issues arising in a more down-to-earth fashion.

If there is a lesson to be learned, it might be not to take too seriously those abstract theorisations: their authors were the first not to do so. Modern scholars' interest in the arguments of early modern jurists on insurance is perfectly understandable, even commendable. So long as this interest does not lead, as it often happened, to a sort of quasi-irrebuttable presumption on the correspondence between those arguments and coeval commercial reality.

¹²¹ Rocco, note 41, not. 51, n. 175-179, p. 406-407.

¹²² One of the many other examples that could be made is the so-called 'sue and labour' clause, which allowed the insured to recover and preserve the cargo at the insurers' expenses in case of mishap. Such expenses were met for the safety of the thing-at-risk: it was only fair that the insurers would reimburse the insured. So, for instance, the case of ransom paid by the insured was relatively easy to solve. As capture by pirates was one of the risks insured against, the insurer ought to refund the payment effected by the insured. See e.g. Santerna, note 25, pt. 4, n. 26-27, *fol.* 38r-v, and Rocco, note 41, not. 55, n. 191, p. 408. Cf. C.M. Moschetti, "Caso Fortuito, Pagamento del Nolo e Risarcimento dei Danni, in Id., *Caso Fortuito, Trasporto Marittimo e Assicurazione nella Giurisprudenza Napoletana del Seicento*, Naples, Edizioni Scientifiche Italiane, 149. The problem was for the case in which the expenses were made so to prevent the loss or damage of the thing – and so to avoid the risk from materialising. Not only there was a problem of causality there, but also the legal basis for the insurer's liability was less obvious, and - moreover - considerably more difficult to fit within the *emptio-venditio* scheme. Ironically, it would have been easier to hold the insurer responsible going back to Bosco's scheme of insurance as sale of the thing. It seems quite telling that the only reference to Roman law that Rocco was able to find on the issue was D.3.5.20(21) pr., substantially a case on the liability of the promisor against his guarantors. The parallel (considering the insured as the insurer's guarantor) is somewhat paradoxical. Rocco, note 41, not. 70, n. 259, p. 413.

¹²³ See the long discussion in Santerna, note 25, pt. 4, n. 18-25, *fol.* 36r-38r, ultimately leading to the scheme '*si facto venditoris, ipse tenetur emptori; si emptoris, ipse venditor; si tertii, pertinet ad emptorem*' (*ibid.*, pt. 5, n. 9, *fol.* 50r). Cf. Stracca, *De Assecurationibus*, note 39, gl. 20, n. 3, *fol.* 113v-114r; Scaccia, note 36, ¶ 1, q. 1, n. 155, p. 42; Barbosa, note 85, *ad* C.4.33.4, § *Cum proponas*, n. 1, *fol.* 153r.

It is important to notice that opting for the innominate contract *facio ut des* would have been considerably less problematic than any nominate one. Nearly all Civilians used it to describe the practical working of insurance, but not to define its legal features. Their preference for nominate contracts is intriguing: if they saw the limits of *emptio-venditio*, *locatio-conductio* or *fideiussio*, then why not content themselves with an innominate contract? Short of classifying early modern Civilians as proto-Pandectists, there might be two answers to that.

The first is to be found in the old problem of the legitimacy of insurance. It would be easy to dismiss the interminable discussions on the problem as a literary topos. In part, it might have been the case. But the treatises we have examined were not meant as academic *divertissements*. They were precious guides for practitioners and high courts alike. What is not always taken into account is that the decretal *Naviganti* targeted expressly the *susceptio periculi*: no premium was allowed despite the fact that the lender-insurer bore the risk in the thing (*pro eo, quod suscipit in se periculum*).¹²⁴ It is doubtful whether the decretal was still scrupulously applied in law courts. But this does not mean that Civilians could dismiss it, as *Naviganti* still stood as a juridical obstacle to their task. The issue was considerably thornier than it would appear in most of modern literature. It was a problem of law, not of morality.¹²⁵ Defending the legitimacy of insurance was thus a precondition to its legal analysis.

The second and more important reason lies in the dissatisfaction with innominate contracts, which were considered residual categories, and in the deeply entrenched habit of thinking in terms of nominate contracts. The long list of rules elaborated by the doctrine, and then also the case law of high courts, were both thought for – and so applicable to – particular kinds of contracts. But always nominate ones. Opting for an innominate contract to explain a new type of agreement would have precluded the applicability of all those rules. It is true that the new instrument was so different from most standard contracts that not all those rules would have been applicable to it. Still, reasoning by categories of contracts was too entrenched in the mind of jurists. If the new contract were to be taken seriously, a proper legal clothing ought to be found for it. And this could mean only a nominate contract. Also, and more deeply, finding the legal basis of insurance in a *facio ut des* contract would have meant creating new law. The rules immediately applicable to innominate contracts were few. Moving from general principles to *ad hoc* agreements could have suited some moral theologians (and, later, natural lawyers), but not Civil lawyers.¹²⁶ At least, not lawyers operating within – and thinking in terms of – *mos italicus*. Emerigon's contempt of those 'mind-fatiguing' dissertations is perfectly justified, but it misses the point entirely.

¹²⁴ *Supra*, note 6.

¹²⁵ The moral objections raised by most of the authors often studied by modern scholars (see e.g. Pesce, note 2, 47-51) were easily dismissed, but not so the underlying legal issue. One of the best summaries of most coeval literature on the point may be found in Joseph Gibalini (1592-1671), *Iosephi Gibalini ... De Vsuris, Commerciis, deque aequitate et vsu fori Lugdunensis ... tractatio bipartita ...*, Lvdgvni, Sumpt. Phil Borde, Laur. Arnaud, et Cl. Rigaud, 1657, lib. 2, cap. 4, art. 3, n. 16-26, p. 246-250. As any other jurist, Gibalini eschewed open confrontation with the old dilemma highlighted by Sinibaldo de Fieschi. Rather, he opted for a number of restrictions and indirect attacks.

¹²⁶ With hindsight, the case of insurance seems to show one of the underlying reasons for the shift towards a general contractual scheme: the tension between enduring reliance on nominate contracts and the progressive realisation of their structural limits.